Transnational Operations, Bi-National Injustice: Chevrontexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador

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I. Introduction

In 1967, a consortium of foreign companies (wholly owned subsidiaries of Texaco and Gulf Oil, both now part of Chevron Corporation), struck oil in the Amazon Rainforest in Ecuador. The discovery was hailed as the salvation of Ecuador’s economy, the product that would pull the nation out...
of chronic poverty and "underdevelopment" at last. At the time, the national economy was centered on the production and export of bananas.1

Exports of Amazon crude began in 1972, after Texaco, the operator of the consortium, completed construction of a 313-mile pipeline to transport crude oil out of the remote Amazon region, across the Andes Mountains to the Pacific coast. The "first barrel" was paraded through the streets of the capital, Quito, like a hero. In some neighborhoods, people could greet it with cups to get drops of crude to commemorate the occasion. After the parade, the oil drum was placed on an alter-like structure at the Eloy Alfaro Military Academy.2

The reality of oil development, however, turned out to be far more complex than its triumphalist launch. For indigenous Amazonian peoples, the arrival of Texaco's work crews meant destruction rather than progress. Their homelands were invaded by outsiders with unrelenting technological, military and economic power. The first ones came from the sky; over time, they dramatically transformed natural and social environments. Their worlds changed forever, Amazonian peoples have borne the costs of oil development without sharing in its benefits or participating in a meaningful way in political and environmental decisions that affect them.

In 1993, a class action lawsuit was filed against Texaco in federal court in New York on behalf of indigenous and settler residents of Ecuador's oil fields who have been harmed by pollution from the company's operations. In 2002, the case, Aguinda v. Texaco, Inc., was dismissed on the ground of forum non conveniens, in favor of litigation in Ecuador. The court denied the plaintiffs a day in court in Texaco's homeland, ruling that the lawsuit belongs in Ecuador because it has "everything to do with Ecuador and nothing to do with the United States."3 The dismissal was conditioned on Texaco's agreement to submit to jurisdiction of Ecuador's courts and was affirmed by the Second Circuit Court of Appeals.4

This article begins with a brief review of events leading to the lawsuit, followed by a discussion of the decision to dismiss. The review — which includes an analysis of petroleum policy, Amazon policy, and environmental protection policy in Ecuador, in Part II, and a description of the operations

1. The other principal exports were cocoa and coffee. JOHN D. MARTZ, POLITICS AND PETROLEUM IN ECUADOR 122, 157 (1978).
2. Interview with Mariana Acosta, Executive Director, Foundation Images for a New World, in Quito, Ecuador (Mar. 3, 1994).
and affected peoples, in Part III — calls into question the court’s finding that the case has “nothing to do with the United States.” Part IV discusses the lawsuit and further concludes that the decision to dismiss Aguinda was colored by a series of detailed, but questionable, factual assumptions relating to control of the operations and the history of litigation in Ecuador’s courts. Parts V and VI examine legal and political developments in the wake of the dismissal, including the emergence of an unprecedented community-based alliance (Makarik Nihua) among a significant sector of indigenous members of the putative Aguinda class — Kichwa and Huaorani in the Napo and Cononaco river basins — who came together to speak for themselves and to defend and vindicate their claims. Part VII concludes with some general observations and recommendations.

II. Background: Governments and Policy in Ecuador

Texaco’s discovery of commercially valuable oil sparked an oil rush, and petroleum quickly came to dominate Ecuador’s economy. Initially, the boom stimulated nationalist sentiments in petroleum policymakers. The government claimed state ownership of oil reserves, created a state oil company (Corporación Estatal Petrolera Ecuatoriana, CEPE, now Petroecuador), acquired ownership interests in the consortium that developed the fields, raised taxes, and demanded investments in infrastructure.

Before long, however, international economic realities asserted themselves and government officials learned that they had less power than was commonly believed. Texaco and other transnational companies launched a counteroffensive to increase profitability and fend off the specter of nationalization. As the operator of Ecuador’s commercial fields, Texaco’s strategy of halting selected field activities and its public relations campaign were particularly effective in putting pressure on the government. Traditionalist domestic elites also favored the interests of foreign oil companies.5

Although relations between Ecuador and Texaco and other oil companies have not been static, at the core of those relationships lies an enduring political reality. Since the oil boom began, successive governments have linked national development plans and economic policy almost exclusively with petroleum policy, and the health of the industry has become a central concern for the State. Domestically, the industry dominates the economy.

5. MARTZ, supra note 1, at 131-32, 144-54, 395.
But in the international arena, Ecuador is a relatively small producer. As a result, it is vulnerable to international pressures, including demands of foreign companies. Oil development has accentuated Ecuador’s dependence on foreign export markets and foreign investment, technology, and expertise.

At the same time, because oil is a nonrenewable resource, levels of production and revenues cannot be sustained without ongoing operations to find and develop new reserves, activities that are capital intensive and technology driven. Thus, when confronted with the realities of oil politics, governments in Ecuador have vacillated over the extent to which petroleum policy should be nationalistic or accommodate the interests of foreign companies. Alarm over forecasts of the depletion of productive reserves has become a recurring theme in petroleum politics, along with the twin policy goals of expanded reserves and renewed exploration to locate new reserves, and the corollary need to reform laws and policies to make the nation more attractive to foreign investors.6

The initial bonanza and easy money from Texaco’s early finds were relatively short lived, and just five years after production began, in 1977, “a flood of foreign borrowing” by the government was needed to sustain economic growth.7 Ecuador has been able to secure very large loans for its size because of its oil reserves and has accumulated a staggering foreign debt. Currently, payments on the debt account for more than 40% of the national budget. At the same time, the benefits of oil development have not been well distributed and the percentage of Ecuadorians living in poverty remains stubbornly high.8

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7. MARTZ, supra note 1, at 207-08.

8. Government figures reported in the press in 1995 put the poverty level at 67% of the population, up from 47% in 1975. En el Ecuador el 67% es Pobre [In Ecuador, 67% Are Poor], EL COMERCIO, Mar. 7, 1995, at C3 (on file with author). A recent World Bank analysis of development trends over two decades found that both poverty and the gap between the rich and poor have increased. See WORLD BANK, REPORT AND RECOMMENDATION OF THE PRESIDENT OF THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT AND THE INTERNATIONAL FINANCE CORPORATION TO THE EXECUTIVE DIRECTORS ON A COUNTRY ASSISTANCE STRATEGY FOR THE REPUBLIC OF ECUADOR (2003) [hereinafter WORLD BANK, 2003 REPORT]. Income inequality is among the highest in the world. Id. ¶ 9. In 2001, the richest fifth of the population received 64% of the national income while the poorest fifth received only 1.7%. Id. ¶ 11. The figures reported in 1996 were 53% and 5%, respectively. WORLD BANK, SOCIAL INDICATORS OF DEVELOPMENT 1996, at 101 (1996). Real economic growth per capita
When the oil rush began, Ecuadorian institutions had very little presence or influence in the Amazon region. The discovery of black gold made the conquest of Amazonia a national imperative. It also provided infrastructure to penetrate remote, previously inaccessible areas, and monies to support the military and bureaucracy. Ecuador launched a policy of national integration to incorporate the Amazon into the national economy and assimilate its native peoples into the dominant national culture. Successive governments have viewed the Amazon as a frontier to be conquered, a source of wealth for the State, and an escape valve for land distribution pressures in the highland and coastal regions.

Government policies in the 1970s and 1980s aggressively promoted internal colonization of the Amazon. The government promised land titles and credit to settlers (colonists) who migrated to the region, cleared the rain forest, and planted crops or pasture, even though most soils are not well suited to livestock or mono-crop production. Government officials pledged to “civilize” indigenous Amazonian peoples.

Most indigenous people, however, did not want to be “civilized” by outsiders. To them, “civilization” and assimilation meant rejecting their beliefs and traditions and entering the lowest social and economic levels of Ecuadorian society. It meant new diseases that shamans and rainforest plants could not cure, the erosion of food security and self-reliance in meeting basic needs, and encroachments on the exercise of their rights to culture and self-determination. The loss of ancestral lands threatened their very survival. From the perspective of native peoples, the government’s national integration policy meant national expansion and ethnocide.9

It was not until 1990 that Ecuador formally recognized indigenous land rights and began systematically granting land titles to indigenous groups. By that time, oil development and internal colonization had displaced native peoples from many areas, significantly reducing their traditional territories. Nonetheless, the change in policy was a major victory for indigenous peoples. It followed years of struggle by indigenous organizations and was

was negative (-0.6%) in 1980-89 and zero in 1990-1999. WORLD BANK, 2003 REPORT, supra, ¶ 11.

9. For a fuller discussion, see Kimerling, Oil Frontier in Amazonia, supra note 6; NORMAN E. WHITTEN, JR., INT’L WORK GROUP FOR INDIGENOUS AFFAIRS, ECUADORIAN ETHNOCIDE AND INDIGENOUS ETHNOGENESIS: AMAZONIAN RESURGENCE AMIDST ANDEAN COLONIALISM (1976). On a visit to the Amazon in 1972, President General Rodriguez Lara rebuffed an appeal for formal recognition of indigenous peoples in the government’s new development policies. “There is no more Indian problem,” he proclaimed. “We all become white when we accept the goals of the national culture.” Id. at 12.
evidently also influenced by emerging international support for the collective rights of indigenous peoples.

In 1998, Ecuador formally recognized the multi-cultural nature of the country and some collective rights of indigenous peoples when it ratified International Labor Organization Convention 169 and included indigenous rights that echo provisions in the international agreement in a new constitution. The State continues to claim ownership of oil and other subsurface minerals in indigenous lands, however, and implementation of indigenous rights in the oil patch has lagged.

In the environmental arena, Ecuador’s Law of Hydrocarbons has included boilerplate environmental directives since at least 1971. Early provisions required oil field operators to “adopt necessary measures to protect the flora, fauna and other natural resources” and to prevent contamination of water, air, and soil. Similarly, Texaco’s production


12. For example, in a study of standards and practices for environmental protection and community relations in the area leased to Occidental Petroleum, the author found that — despite both the legal reforms and public pledges by the company to voluntarily raise standards and respect its indigenous neighbors — efforts by indigenous Kichwa to participate in environmental and development decision-making and monitoring had been rebuffed, and community lands solicited by Occidental for use for production facilities had been expropriated by the state without the knowledge or consent of affected communities. See generally Judith Kimerling, Rio + 10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia, 27 COLUM. J. ENVTL. L. 523 (2002) [hereinafter Kimerling, Rio + 10]; Judith Kimerling, Uncommon Ground: Occidental’s Land Access and Community Relations Standards and Practices in Quichua Communities in the Ecuadorian Amazon, 11 LAW & ANTHROPOLOGY 179 (2001) [hereinafter Kimerling, Uncommon Ground].


14. Id. art. 31(s)-(t). In 1982, the provisions were amended to require companies to submit, for approval by Ecuador’s Ministry of Energy and Mines (MEM), “plans, programs and projects” to protect natural resources and prevent adverse social and economic impacts on local communities; and to require operators to conduct operations in accordance with Ecuador’s environmental laws, regulations, and international practice “in matters of preservation of the rich fisheries and farming industry.” R.O. No. 306 (Aug. 13, 1982) (Ecuador).
contract with Ecuador, negotiated after the discovery of commercially valuable reserves and signed in 1973, required Texaco “to adopt suitable measures to protect flora, fauna, and other natural resources and to prevent contamination of water, air and soil under the control of pertinent organs of the state.” In theory, those and other, comparable requirements in generally applicable laws offer mechanisms for regulation of significant sources of oil field pollution. In practice, however, Texaco and other oil companies have ignored the laws, and successive governments have failed to implement and enforce them.

When Texaco began its operations, there was little public awareness or political interest in environmental issues. In addition, environmental protection in the oil patch depends on the use of technology, and Ecuador relied on Texaco, as the operator of the fields, to transfer petroleum technology and train national technicians. Ecuadorian officials saw Texaco as a prestigious international company with vast experience in the oil patch and access to “world class” technology and capital. They relied on Texaco to design, procure, construct, and operate the infrastructure that turned Ecuador into an oil exporter. In its new production agreement, Texaco’s wholly owned subsidiary, Texaco Petroleum Company (TexPet), agreed to use “modern and efficient” equipment; maintain the equipment and


17. In practice, government intervention in the hydrocarbon sector is dominated by MEM and Petroecuador. See Judith Kimerling, Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador’s Amazon Oil Fields, 2 SW. J. L. & TRADE AM. 293, 334 (1995) [hereinafter Kimerling, Rights, Responsibilities, and Realities]. Environmental units were not created in those entities until 1984 and 1990, respectively. Id. at 339. Irrespective of government regulation, Texaco had a duty of care under Ecuador’s Civil Code. Id. at 323, 351-58.

facilities in good working order;\textsuperscript{19} train Ecuadorian students;\textsuperscript{20} and turn over the field operations and equipment to Petroecuador "in good condition" when the contract ended in 1992.\textsuperscript{21}

In the environmental law vacuum, Texaco set its own environmental standards and policed itself. As Petroecuador’s "professor," Texaco also set standards for that company’s operations. Texaco’s standards and practices, however, did not include environmental protection or monitoring. The company did not instruct its Ecuadorian personnel about environmental matters, and oil field workers who were trained by Texaco were so unaware of the hazards of crude oil during the 1970s and 1980s that they applied it to their heads to prevent balding. They sat in the sun or covered their hair with plastic caps overnight. To remove the crude, they washed their hair with diesel. Similarly, many workers took jars of crude to parents suffering from arthritis.\textsuperscript{22} The rumors attributing medicinal qualities to Amazon crude are not entirely surprising, considering its status as the harbinger of a great future for the nation and Texaco’s neglect of environmental and human health concerns.

Thus, Ecuador’s petroleum policy in the 1970s and 1980s revolved around economic and national development issues and did not include a serious environmental component. The evidence in the historical record, however, does not suggest that environmental neglect was a conscious and informed policy choice by Ecuador at that time. Unlike Texaco, which had, or should have had, knowledge about both the hazards of oil field pollution

\textsuperscript{19} Id. cl. 40.2.
\textsuperscript{20} Id. cl. 38.1.
\textsuperscript{21} Id. cl. 51; see also id. cl. 18.2(a)-(b). On June 6, 1974, two years after commercial production began, Petroecuador (then CEPE) acquired a 12.5% participating interest in the Texaco-Gulf consortium from Texaco and a 12.5% interest from Gulf, giving it a 25% share of stock in the consortium. Republic of Ecuador, Ministry of Energy and Mines, Contrato para la Ejecución de Trabajos de Reparación Medioambiental y Liberación de Obligaciones, Responsabilidades y Demandas [Contract for Implementation of Environmental Remedial Work and Release from Obligations, Liability and Claims] at 2 (May 4, 1995). Under pressure, Gulf sold its remaining interests to Petroecuador in 1977 and left the country. With 62.5% of the stock, Petroecuador became the majority shareholder in the new consortium; Texaco retained ownership of 37.5% of the stock and continued to be the operator of the consortium’s assets. MARTZ, supra note 1, at 111, 168, 186; see also Answer to the Complaint filed by Maria Aguinda Salazar v. ChevronTexaco Corp., Part II.A. 1.18, Superior Court of Nueva Loja (Ecuador) (Oct. 21, 2003), available at http://www.texaco.com/sitelets/ecuador/docs/2003oct21_dismiss.pdf.

\textsuperscript{22} Interview with Margarita Yépez, former social worker for Texaco Petroleum (1973-1989), in Quito, Ecuador (Mar. 3, 1994).
and the technology that could be used to reduce it, such as reinjecting rather than discharging oil field brine (a high-volume waste, also known as “produced water”), the Ecuadorians were inexperienced and apparently unaware of the environmental tradeoffs in the oil patch. In the triumphalist welcome to Texaco’s discovery of commercially valuable oil and the struggle over whether petroleum policy should accommodate foreign companies or be nationalistic, environmental protection was eclipsed altogether.

Indeed, when environmental officials in Ecuador’s Ministry of Energy and Mines (MEM) were confronted in 1990 with a study (subsequently published as *Amazon Crude*) by an environmental lawyer from the United States (the author) that documented shocking pollution and other impacts from operations by Texaco and other companies, the officials professed ignorance. Texaco was their “professor,” they explained; the company taught them how to produce oil but did not teach them environmental protection.23

That basic view — that public officials did not realize that industry operations were taking a serious toll on the environment until international environmentalists put a spotlight on the region — has been echoed by others.24 For example, according to General Rene Vargas Pazzos, who was a key policymaker in the military government that ruled Ecuador when the oil rush began, government officials did not question Texaco about

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23. JUDITH KIMERLING, *AMAZON CRUDE* ix, xxvi (1991) [hereinafter KIMERLING, *AMAZON CRUDE*]. The author’s study was the first to document widespread pollution and other environmental and social impacts from oil development in tropical forests. It was based on extensive field work undertaken in 1989-90, in collaboration with the indigenous organizations, FCUNAE (Federation of Comunas Union of Natives of the Ecuadorian Amazon) and CONFENIAE (Confederation of Indigenous Nationalities of the Ecuadorian Amazon), and other research. The disclosures first appeared in a draft report in 1989. Subsequently, the author expanded the report; in 1991, it was published with color photographs as *Amazon Crude* by Natural Resources Defense Council (NRDC), a prestigious U.S. nongovernmental organization (NGO). A Spanish-language adaptation was published with FCUNAE by Abya Yala Publications. JUDITH KIMERLING, *CRUDO AMAZÓNICO* (1993).

24. Prior to *Amazon Crude*, even prominent rainforest literature mistakenly reported that oil development did not directly harm the environment, reflecting, among other factors, the focus by environmental advocates on deforestation. See, e.g., Stephen Mills, *Ecuadorians Join Over Forest Oil*, BBC WILDLIFE, Mar. 1990, at 187, 187 (reporting that a team from the World Conservation Union (IUCN) gave oil development in Ecuador “a clean bill of health” due to the relatively small areas affected by deforestation); ADRIAN FORSYTH & KEN MIYATA, TROPICAL NATURE 209 (1984); JAMES D. NATIONS, TROPICAL RAINFORESTS: ENDANGERED ENVIRONMENT 108-11 (1988).
environmental practices because they did not question Texaco's technical expertise or know that the operations could damage the environment:

We thought oil would generate a lot of money and that development would benefit the country, but we did not have technical know-how, and no one told us that oil was bad [for the environment]. . . . We were fooled by Texaco. We were betrayed. We trusted the company. . . . Texaco was responsible for all of the operations. . . . We were not experts. . . . The [MEM] Hydrocarbons Directorate approved the work, but the technology came from Texaco. It is like contracting a doctor. You go in and can see that the room is fine. But with the operation, it is beyond your control and know-how. We accepted [Texaco's technical decisions] with good faith. . . .

We were happy about the petroleum. We said, "Do it and tell us what it will cost." . . . But we did not know about environmental issues. . . . We thought Texaco used the best methods. . . . Texaco was the operator. We did not interfere in technical decisions because that was Texaco's responsibility. That is what we paid them for. . . . We controlled only the production rates, the payment of taxes [and things like that]. . . .

According to Vargas, all of the work plans and technical specifications for the operations were elaborated and approved by Texaco in the United States and sent to Quito from the company's Latin America/West Africa Division, based in Coral Gables, Florida. According to Margarita Yepez, who worked for Texaco Petroleum from 1973-1989 and was based in Quito, the operations were closely supervised from the Coral Gables office: every department head in Quito had a direct telephone line to a supervisor in Coral Gables; important contracts for field operations were approved and signed in the United States; expenditures were closely supervised from the United


26. Id.; see also Unsworn Declaration by Manuel E. Navarro V. Subject to Punishment for Perjury in Brief Amicus Curiae for the Federation of Comunas Union of Natives of the Ecuadorian Amazon (FCUNAE) and Affiliated Communities and of the Indigenous Organization of the Cofán Nation of Ecuador (OINCE) and Affiliated Communities, Aguinda v. Texaco, Inc., No. 93 Civ. 7527, Exhibit 3, ¶¶ 2-5 (S.D.N.Y. Mar. 9, 1994) [hereinafter Brief Amicus Curiae of FCUNAE & OINCE].
States; and the Quito office had a full-time employee to microfilm all reports and other written materials to send to Coral Gables in a daily mail pouch.27

Texaco’s international prestige and its day-to-day control as the operator of field operations gave the company enormous power in the oil patch — power that was compounded by systemic deficiencies in the rule of law and governance in Ecuador. Texaco’s power and the culture of impunity in the oil fields — the belief that companies can do whatever they want and suffer no adverse consequences as long as they get the oil — is illustrated in a remark by an Ecuadorian worker in 1993, the year after Texaco’s production contract expired. The man worked for a subcontractor, driving a truck that dumped untreated oil on roads for dust control and maintenance purposes. When asked (by the author) what he thought about the practice and whether he had any concerns for his health or the environment, he replied: “Three years ago, I went to a training course . . . and a gringo from Texaco told us that oil nourishes the brain and retards aging. He said that in the United States they do this on all of the roads, and people there are very intelligent.” When asked if he believed what the trainer from Texaco had said, he answered: “It doesn’t matter what I think; here, Texaco, and now Petroecuador, manda, gives the orders. Everyone works for them.”28

In the wake of Amazon Crude, environmental protection has become an important policy issue in Ecuador. Since the early 1990s, both government officials and oil companies must at least appear to be “green.” It remains to be seen, however, whether those changes in consciousness and discourse will lead to environmentally significant changes in the field. To date, the record is not encouraging, despite both public pledges by a growing number of companies to voluntarily raise environmental standards and a clear trend on paper toward increasingly detailed, albeit incomplete, environmental legal rights and requirements, including constitutional recognition since 1984 of the right of individuals to live in an environment “free from contamination” and expanded constitutional group environmental rights since 1998.29 As in other areas of the law, the failure of the state to implement meaningful environmental protection law reflects the enormous gap between legal ideals and social and political realities.30

27. Unsworn Declaration by Bertha Margarita Yépez Silva Subject to Punishment for Perjury, in Brief Amicus Curiae of FCUNAE & OINCE, supra note 26, Exhibit 2, ¶¶ 2-5.
28. The exchange took place in the field on Sept. 26, 1993.
29. For the current provision, see ECUADOR CONST. OF 1998, art. 23(6). For the earlier provision, see ECUADOR CONST. OF 1979, art. 19(2) (provision adopted in 1984).
30. In form, Ecuador is a constitutional democracy. In practice, democratic institutions are
fragile and unstable, and the legitimacy of the political system is minimal. Public confidence in political elites and institutions, including the courts and bureaucracy, is low, and political parties and public officials are widely considered to be among the most corrupt in Latin America. See, e.g., Kimerling, Rights, Responsibilities, and Realities, supra note 17, at 310-03. Governments change with considerable frequency, and even when regimes stay in power, turnover at the highest levels is not uncommon. For example, between 1830, when Ecuador became a republic, and 1895, twenty-one individuals and juntas occupied Ecuador's presidency for a total of thirty-four times; only six completed their constitutional term of office. David Corkill & David Cubitt, Ecuador: Fragile Democracy 10 (1988). Between 1925 and 1947, twenty-three heads of state were catapulted in and out of office. During 1948-1960, three successive elected administrations completed their term of office, but this apparent stabilization of democracy was followed by more volatility. At the time of Texaco's oil strike (1967), Ecuador was governed by an interim president. In 1968, a popularly elected president took office. After two years, he suspended the constitution and assumed dictatorial powers, but in 1972 he was removed by the military, amidst a wave of popular protest. Martz, supra note 1, at 5-6. In 1979, the military ceded power to a constitutional civilian government. Id. at 247. The new president, Jaime Roldos Aguilera was killed in a suspicious plane crash two years into his term. Id. at 249-57, 303. The next three elected presidents each completed their constitutional term of office; however, since President Sixto Durán Ballen left office in 1996, no elected president has completed his term of office, and eight different individuals have occupied the presidency. For a fuller discussion, see Kimerling, Oil Frontier in Amazonia, supra note 6, at 417-27 (Part II.A); id. at 517 & n.284; id. at 525 & n.306; id. at 650-52 & nn.615-22; Simon Romero, Leftist Candidate in Ecuador Is Ahead in Vote, Exit Polls Show, N.Y. Times, Nov. 27, 2006, at A8.

According to the letter of the law, the Constitution is the supreme law of the land. Ecuador Const. of 1998, art. 272. In practice, however, constitutional law has been unstable and relatively easy to manipulate, disregard, and supplant. Ecuador has had twenty constitutions since becoming a republic. Throughout its history, Ecuador’s judiciary has failed to enforce and promote the rule of law through the impartial administration of justice. Although the judiciary’s deficiencies have prompted repeated constitutional and other reforms since the return to democracy in 1979, those reforms have failed to establish an independent judiciary, and the courts have become notoriously politicized, inefficient, and corrupt. A popular saying, “the law is for those with a poncho,” refers to indigenous peoples in the highlands and reflects the general belief that the rich and powerful (but not indigenous Ecuadorians) are above the law. For a fuller discussion of the administration of justice in Ecuador and environmental law in the oil patch, see Kimerling, Oil Frontier in Amazonia, supra note 6; Kimerling, Rio + 10, supra note 12; Judith Kimerling, International Standards in Ecuador’s Amazon Oil Fields: The Privatization of Environmental Law, 26 Colum. J. Envtl. L. 289 (2001) [hereinafter Kimerling, International Standards]; Judith Kimerling, ?Modelo o Mito? Tecnología de Punta y Normas Internacionales en los Campos Petroleros de la Occidental.[Model or Myth? Cutting Edge Technology and International Standards in the Oil Fields Operated by Occidental] (2006) [hereinafter Kimerling, Model or Myth?]. In addition to the legacy of Texaco, the implementation of environmental law in the oil fields has been hampered by the absence of political will; inadequate financing; lack of technical capacity; industry influence and resistance to regulation; and the failure of the rule of law and good
III. Texaco's Operations and the Affected Peoples

Oil exploration and production is an industrial activity. Among other impacts, it generates large quantities of wastes with toxic constituents and presents ongoing risks of spills. The consortium led by Texaco extracted nearly 1.5 billion barrels of Amazon crude over a period of twenty-eight years (1964-1992). The operations expanded incrementally, and by the time Texaco handed over operational responsibility to Petroecuador in 1990, it had drilled 339 wells in an area that spans roughly one million acres. The facilities were producing some 213,840 barrels of oil daily from more than 200 wells in sixteen fields. They also generated more than 3.2 million gallons of toxic wastewater (produced water) every day, virtually all of which was dumped into the environment via unlined, open-air earthen waste pits, without treatment or monitoring — a practice that has been generally banned in the United States by federal law since 1979. In addition, they generated more than 49 million cubic feet of natural gas every day. Some of the gas was processed for use in the operations; however, most was flared, or burned as a waste, without temperature or emission controls, depleting a nonrenewable resource and contaminating the air with greenhouse gases, precursors of acid rain and ground level ozone, soot, and other contaminants that probably include dioxin.

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31. For a fuller discussion of the operations, impacts, and affected groups, see Kimerling, Oil Frontier in Amazonia, supra note 6; KIMERLING, AMAZON CRUDE, supra note 23.

32. The dates include exploration and production; commercial production began in 1972. Texaco transferred operational responsibility for the trans-Ecuadorian Pipeline to a subsidiary of Petroecuador on October 1, 1989. On June 30, 1990, another subsidiary of Petroecuador assumed operational responsibility for exploration and production; Texaco retained a minority ownership interest in the consortium, remained involved in management activities, and shared in profits from the operations until its contract with Ecuador expired on June 7, 1992.

33. 40 C.F.R. § 435.32 (2006). The no discharge standard was promulgated by the United States Environmental Protection Agency under the Clean Water Act and applies to onshore exploration and production wastes. Before the national standard was enacted, state environmental laws prohibited discharges of produced water in many locations in the United States.

34. Produced water (also known as oil field brine) and natural gas are extracted with the oil and separated in the field. Produced water wastes typically contain hydrocarbons (which include benzene and polycyclic aromatic hydrocarbons, or PAHs), heavy metals, toxic levels of salts, and other contaminants. At some locations, they can also contain naturally occurring radioactive material (NORM). Using government figures, the author has estimated that Texaco's total produced water discharge was 19.3 billion gallons, and some 1600-16,000
In addition to routine, willful discharges and emissions, Texaco spilled nearly twice as much oil as the Exxon Valdez from the main pipeline alone, mostly in the Amazon basin.\textsuperscript{35} Spills from secondary pipelines, flow lines, tanks, production stations, and other facilities were also frequent and continue to this day. In contrast to the oil industry’s typically energetic response to spills in the United States, Texaco’s response in Ecuador was limited to shutting off the flow of petroleum into the damaged portion of the pipeline and allowing the oil already in the line to spill into the environment before making the necessary repairs. No cleanup activities were undertaken, and no assistance or compensation was provided to affected communities. Texaco’s pipeline system crosses myriad rivers and streams; as a result, depending on the location and size of the release, in addition to devastating local impacts, spills can cause oil slicks on waterways and foul water supplies and fisheries of downstream communities for scores or even hundreds of kilometers. Moreover, because spills are not properly cleaned up, they can become sources of ongoing, chronic pollution in affected watersheds for months or years.

The areas affected by pollution from spills and deliberate discharges from the Texaco-Petroecuador facilities are mostly located in the watershed of the Napo River. The Napo is a major tributary of the Amazon River. In Ecuador, affected areas in the greater Napo basin can be divided into three sectors: (1) the lower Napo River and hydraulically-connected lagoons and wetlands, and waterways that feed into the Napo in Ecuador; (2) the Aguarico River basin, which flows into the Napo east of Ecuador, in Peru; and (3) the Cononaco River basin, located in the northern watershed of the Curaray River, which also flows into the Napo in Peru. The Lower Napo sector is inhabited by indigenous Kichwa and Huaorani; the Curaray basin is inhabited by indigenous Huaorani; and the Aguarico basin is inhabited by indigenous

\textsuperscript{35} The Exxon Valdez spilled an estimated 10.8 million gallons of oil into the Prince William Sound. According to figures recorded by MEM, Texaco spilled an estimated 16.8 million gallons from the trans-Ecuadorean Pipeline alone, in thirty major spills, during its tenure as the pipeline’s operator. When adjusted using figures from the World Bank for one of the spills, the total increases to 19.23 million gallons. The numbers do not include spills from secondary pipelines, flow lines, tanks and other facilities, which evidently were not recorded by the government.
Cofan, Secoya, Siona, and Kichwa. In addition to indigenous residents, the affected areas are also now inhabited by colonists from Ecuador’s highland and coastal regions and Shuar from Ecuador’s southern Amazon, who migrated to the area in the wake of Texaco’s oil development activities.36

The last indigenous Tetetes, now extinct as a people, reportedly fled their homelands near Lago Agrio, the boom town that sprang up around Texaco's first commercial field. The Huaorani, Kichwa, Cofan, Siona, and Secoya also lost lands to infrastructure and the flood of colonists who followed oil roads into previously inaccessible forests. By 1989, an estimated 2.5 million acres had been deforested along more than 500 kilometers of roads — most of them built by Texaco — making oil development the primary engine of deforestation and dislocation of indigenous peoples in Ecuador’s Amazon region.37

The Huaorani, a semi-nomadic warrior people, tried to drive off the oil invaders with hardwood spears; the oil crews were afraid. In response, Texaco collaborated with Ecuador and evangelical Christian missionaries from the U.S.-based Summer Institute of Linguistics/Wycliffe Bible Translators to pressure and trick Huaorani clans into leaving the areas where Texaco wanted to work, pacify the Huaorani, and exterminate their culture and way of life. Using aircraft supplied by the company, missionaries contacted and physically removed some 200 Huaorani from the path of the oil crews and took them to live in a distant Christian settlement located in the southwestern corner of Huaorani territory. Other Huaorani fled deeper into the forest, away from Texaco and the missionaries.38

36. The author works with the Huaorani and Lower Napo River Kichwa.
37. KIMERLING, AMAZON CRUDE, supra note 23, at 75-77 (citing U.S. Agency for Int’l Dev. (USAID), Natural Resources Management and Conservation of Biodiversity and Tropical Forests in Ecuador: A Strategy for USAID, Draft 3 (Mar. 1, 1989)). Road construction also opened previously inaccessible forests to land speculation and logging, and disrupted natural drainage patterns at many locations.
38. The evangelization of the Huaorani was pioneered by Rachel Saint. Rosemary Kingsland, a Christian journalist who wrote a book about that work with Saint's cooperation, described the mood of the time:

The northern [oil] strike was enormous .... Nothing would stop them from going in now and there was talk of using guns, bombs, flame-throwers. Most of the talk was wild, but the result would be the same: a war between the oil men and the Aucas [Huaorani]; a handful of naked savages standing squarely in the middle of fields of black gold, blocking the progress of the machine age. If it was to be a question of no oil or no Aucas, there was only one answer.

ROSEMARY KINGSLAND, A SAINT AMONG SAVAGES 126 (1980). For a fuller discussion, see Kimerling, Oil Frontier in Amazonia, supra note 6; Judith Kimerling, Dislocation,
One of those groups, the Tagaeri, continued to resist all efforts by outsiders to contact them. For three decades, they hid in the forest while their ancestral lands were occupied by strangers. In 2003, they disappeared as a distinct group; some survivors are believed to be living with another voluntarily isolated Huaorani clan, the Taromenane. They, too, however, are in danger of becoming extinct, due to incrementally expanding — and encroaching — oil exploration and production and violent encounters with loggers who use the road that Texaco built after the Huaorani were displaced, to enter and remove wood from the area.

The Huaorani who went to live with the missionaries were told that Huaorani culture is sinful and savage, and were pressured to change, abandon their traditions, and adopt the Christian way of life. Among other hardships, they suffered from severe culture shock and stress, as well as epidemics of new diseases that sickened, and even killed, many family members. Important rainforest products were quickly depleted, there were food shortages, and the Huaorani, whose culture places a high value on independence and sharing, had to rely on imported foods and medicines obtained by the missionaries. When groups of Huaorani left the Christian settlements to return to the land of their ancestors, it was not the same as before. The rainforest that was their home and source of life had been invaded and degraded by outsiders while they were away. In addition to Texaco’s infrastructure (wells, pipelines, production stations, and roads), settlers had used the company’s roads to colonize Huaorani lands.

As a result of Texaco’s operations, the Huaorani lost their political sovereignty and sovereignty over their natural resources, and their territory and access to natural resources were significantly reduced. Many remaining lands and resources have been degraded and pollution is a continuing problem, and growing threat, for a number of communities. As a people, the Huaorani have been thrust into a process of rapid change, loss of territory and natural resources, environmental degradation, and external pressures that could lead to their extinction.

The Kichwa who live along the Napo River had already been contacted by outsiders when Texaco arrived; despite that, they still enjoyed a high level of

self-determination and sovereignty over their natural resources. Like the Huaorani, they see the rainforest as the source of life and rely on hunting, fishing, gathering, and gardening for food and other needs. Like the Huaorani and other indigenous peoples, their cultures, economies, and well-being depend on maintaining a high level of environmental quality. As with the Huaorani, the contamination, degradation, destruction, and depletion of the land and natural resources on which they depend — including important food and water supplies — as a result of Texaco's operations, have caused major cultural, social, and economic disruptions, in addition to ongoing exposures to toxic substances and new health problems for current and future generations.

Before Texaco's arrival — indeed, since before written history — the Huaorani, Napo Kichwa, and other indigenous peoples lived bien (well), in harmony with their rainforest environment. Oil development violently disrupted their way of life. In addition, Texaco created poverty among forest peoples by damaging natural resources that provided them secure, self-reliant, and sustainable sources of food, water, medicine, and shelter. When Texaco began its search for oil, the area was unspoiled humid tropical forest. Now, in the headwaters of an ecosystem that is world-renowned for biological richness and is believed to contain 20-25% of the world's flowing fresh water, many families no longer have clean water or enough food.

Dislocation by colonists and by the company have significantly reduced indigenous territories. In many remaining lands, pollution and the reduction and fragmentation of forest habitat have degraded, and continue to degrade, important natural resources, further straining the subsistence base of indigenous communities and limiting their range for hunting, fishing, gathering, and gardening. Some forest species, both aquatic and terrestrial, have become more difficult to find, while others have disappeared. In many areas, traditional crops, such as manioc and plantain, no longer grow well. The area hosts an industrial corridor, with boom towns, uncontrolled colonization, and degraded forests and waters. Pollution saturates the oil fields in addition to affecting downstream and downwind areas. In some communities, even the rain is no longer clean; residents say it feels "slippery, like soap." The damages caused by Texaco are so serious and widespread that other oil companies now go to great lengths to try to distinguish their operations: "We are not like Texaco, we use cutting edge technology and
international standards to protect the environment," has become a common refrain.39

To varying degrees, indigenous families are moving away from traditional subsistence activities toward a new cash economy because of damage to natural resources or because they want cash to buy goods they cannot themselves produce. As a result, many people substitute carbohydrates for fish and wildlife proteins in their diet, which can lead to malnutrition and other health problems. Moreover, when subsistence activities are undermined or abandoned, traditional indigenous cultures are eroded and dependence on outsiders increases. Texaco's operations have significantly diminished access to renewable natural resources and impaired subsistence production without

39. For a study of a prominent corporate initiative claiming to apply cutting edge technology and international standards in the Ecuadorian Amazon, by a subsidiary of the U.S.-based oil company, Occidental Petroleum, see Kimerling, Rio + 10, supra note 12 (environmental and community relations standards and practices); Kimerling, International Standards, supra note 30 (environmental standards and practices); Kimerling, Uncommon Ground, supra note 12 (community relations standards and practices). The study concludes that some things are changing in Ecuador's oil frontier, but the companies are still firmly in control of oil field operations, including environmental and community relations standards and practices. Voluntary initiatives have led some companies to share some financial benefits of development with local communities, but a vast gap remains between the promises of sustainable development and respect for the rights of indigenous peoples to participate in development and environmental decisions that affect them (as recognized in international law and Ecuador's constitution) and the reality of development in the oil fields. Some companies may be raising levels of environmental protection in some areas, at least in the short term; that is not certain, however, and needs independent verification and long-term monitoring. Two key questions are whether ground water resources are protected from contamination by waste injection activities and buried wastes and pipelines, and whether aging pipelines, well casings, and other equipment will be properly inspected and maintained. As a general matter, although voluntary initiatives by oil companies are clearly needed to raise levels of environmental protection, they are not without peril. The promise to apply "international standards," "cutting edge technology," "best practice," and/or "corporate responsibility" has become a tool that multinational oil companies can use to dominate and control environmental information, decision-making, and implementation; deflect and discourage meaningful oversight; rebuff and belittle grievances by affected populations; and paint a veneer of environmental excellence and social responsibility to camouflage business as usual. In addition, they can operate to undermine the development of national environmental law and capacity in developing nations like Ecuador, by arbitrarily legitimizing norms that have been defined by special interests, and reassuring government officials and other stakeholders that standards and practices are improving. Although the voluntary initiatives cannot be divorced from the social, economic, and political context in which they operate, a major source of abuse can be linked to the widespread confusion, outside of industry circles, about the source and substance of applicable norms.
providing affected indigenous populations with a means of purchasing essential goods. The loss of territory and resources has also impaired food security and food sovereignty and reduced the resource base of indigenous peoples for sustainable development. As a general matter, distribution of the costs and benefits of “development” has not been equitable. Indigenous communities continue to bear a disproportionate share of the costs without sharing in the benefits or participating in decision-making that affects them. At the same time, pressures to modernize and adopt the ways of the “civilized” culture are strong. Alcoholism and alcohol-related violence and accidents are new but growing problems. In addition, both indigenous and settler residents affected by Texaco’s operations are increasingly concerned about the safety of their food, water, and air, and many people attribute health problems to the company’s pollution, including malnutrition, skin rashes, memory loss, headaches, fevers, miscarriage, birth defects, and cancer. These health problems and concerns are likely just the tip of the iceberg.

Despite a serious decline in their quality of life, most indigenous communities have managed to maintain a strong sense of identity and culture. Dependence on the rainforest remains high, even as the quality and quantity of renewable natural resources continues to grow poorer and sharp inequities in access to forest resources have emerged. If present trends continue, however, widespread poverty, hunger, disease and other health problems, and social disintegration can be expected. To survive as peoples, indigenous populations must regain control over their remaining territories and reverse the trend of environmental degradation. Emerging international law recognizes the special importance of land rights and a healthy environment to the health, well-being, and cultures of indigenous peoples. Unless remedial action is taken to clean up and restore damaged areas, prevent further pollution, and upgrade and repair — or properly close — aging production facilities, the operations that were launched by Texaco and continued by Petroecuador will continue to threaten and harm important natural resources, further diminishing the ability of present and future generations to enjoy the benefits of their culture and to continue or revitalize, a sustainable and self-reliant way of life.

IV. Aguinda v. Texaco

Texaco’s production contract expired in 1992, and in November 1993, a class action lawsuit was filed against Texaco, Inc. in federal court in New

40. See Kimerling, Oil Frontier in Amazonia, supra note 6, at 474-628 (Parts V through XI) for a detailed analysis of the Aguinda litigation and decision to dismiss.
York, on behalf of indigenous and colonist residents who have been harmed by pollution from the company's Ecuador operations. The suit, *Aguinda v. Texaco, Inc.*, was filed by U.S.-based attorneys after they read about the *Amazon Crude* study. The case was a toxic tort action, based on common law claims of negligence, public and private nuisance, trespass, civil conspiracy, and medical monitoring. It also included an international law claim under the Alien Tort Claims Act,\(^{41}\) based on alleged (unspecified) violations of the law of nations, and a claim for equitable relief "to remedy the contamination and spoilation of their properties, water supplies and environment."\(^{42}\) The complaint named some seventy-four plaintiffs; the putative class was defined geographically and estimated to contain at least 30,000 persons.\(^{43}\) Until its merger with Chevron in 2001, Texaco's corporate headquarters was in White Plains, New York, and the complaint alleged that decisions directing the harmful operations were made there.\(^{44}\)

The complaint did not identify all of the affected indigenous peoples or distinguish their claims and injuries from those of the colonists, who are also adversely affected by the pollution and included among the named plaintiffs and putative class. Similarly, it did not include claims based on the special rights of indigenous peoples. In press releases and other public relations and advocacy activities related to the case, however, the plaintiffs' lawyers and nongovernmental organizations (NGOs) that support the lawsuit often give the impression that all of the plaintiffs are indigenous Amazonian peoples. As a result, confusion about the plaintiffs and origins of the litigation have characterized many of the extensive press reports about the case, and it has commonly been described as a lawsuit brought by "Indians" or "indigenous people from the rainforest."\(^{45}\)

In response to the lawsuit, Texaco denied any wrongdoing and vigorously fought the legal action. In submissions to the court and in the media, Texaco alleged that the operations had complied with Ecuadorian law and then-prevailing industry practices. Moreover, the company argued, it had not operated in Ecuador since 1990, and any legal claims should be pursued there instead of in the United States. In court, Texaco also denied parent company control over the operations, which, as noted above, were carried out by a


\(^{43}\) *Id.* ¶ 30.

\(^{44}\) *Id.* ¶ 2; see also *id.* ¶ 28.

wholly-owned subsidiary, Texaco Petroleum Company, in a consortium, initially with Gulf and subsequently with Petroecuador. This effort to distance the parent company from the Ecuador operations and assert that it had no role in environmental management there contradicted both the image that Texaco Petroleum had cultivated in Ecuador (of a leading international company based in the United States) and the image commonly promoted by Texaco, Inc. in public relations materials and responses to concerned consumers and NGOs before it was sued (of an industry leader engaged in worldwide operations that is committed to environmentally responsible practices wherever it operates). Texaco’s legal submissions further alleged that Texaco, Inc.’s only involvement in the challenged operations was an indirect investment in a fourth tier subsidiary; emphasized that Texaco Petroleum held a minority (37.5%) interest in the consortium from 1977 until June 1992, when its interest ended entirely; and contended that environmental practices were heavily regulated by Petroecuador and Ecuador.

Outside court, Texaco and Ecuador moved quickly to negotiate issues raised by the lawsuit, in what ABC News Nightline later called an “exit agreement.” They signed a series of agreements in 1994-1995 (“Remediation Contract”). Under the accord, Texaco agreed to implement limited environmental remediation work; make payments to Ecuador for socio-economic compensation projects; and negotiate contributions to public works with municipal governments of four boom towns that sprang up around the company’s operations and, in the wake of Aguinda v. Texaco, sued Texaco Petroleum in Ecuador. In exchange, the government and Petroecuador agreed to release and liberate Texaco Petroleum and Texaco (and their subsidiaries and successors) from all claims, obligations, and liability to the Ecuadorian State and national oil company “related to contamination” from the operations. The agreement did not include a price tag, but Texaco subsequently reported that it spent forty million dollars on the remediation program.

The “remedial work” undertaken by the company, however, was extremely limited in scope and largely cosmetic. It did not contain or reverse the tragic

46. For example, the scope of work did not include measures to investigate and remedy air pollution, contamination in ground or surface waters, pollution from oil-soaked roads, or most spill sites; evaluate and address impacts on natural resources; or assess the integrity of aging pipelines and well casings and take corrective action, where needed, to prevent leaks and spills. Most of the work, which began in October 1995 and was completed in August 1998, was designed to “close” abandoned waste pits at well sites. However, hundreds of waste pits (at both well sites and production stations) were omitted from the scope of work, as was most offsite contamination at those locations. In addition, the reliability of the closure procedure
environmental legacy of the operations or benefit affected rural populations. Indeed, the accord, which was negotiated behind closed doors, without meaningful participation by affected communities, transparency, or other democratic safeguards, seems more like an agreement between polluters to limit cleanup requirements and lower and divide their costs than a remediation program based on a credible assessment of environmental conditions and measures needed to remedy them. The final release of Texaco and its corporate family reflects the enduring political and economic power of the company and the selective application of the law in the oil frontier. Inasmuch as it liberates the company from environmental obligations to the state, it also raises serious questions of law and legitimacy.

In court, after nine years of litigation, Texaco’s efforts to dismiss the case were successful, and the Aguinda plaintiffs were essentially told to go home and sue in Ecuador. The case was dismissed on the ground of *forum non conveniens*, a doctrine that allows a court to dismiss a case that could be tried in a different court, in the interest of justice or for the convenience of the parties. When a federal court applies the *forum non conveniens* doctrine, it first determines whether there is an alternative forum and then it balances private and public interest factors to determine which forum is more convenient. Private interest factors include access to evidence, the cost of obtaining the attendance of willing witnesses, the availability of compulsory process for unwilling witnesses, the possibility of viewing the premises, and other practical concerns. Public interest factors include local interest in the controversy, possible problems in the application of foreign law, the fairness of imposing jury duty on residents of a jurisdiction that has little to do with the controversy, and other public concerns.

In *Aguinda*, the district court ruled that Ecuador’s courts provide an alternative forum and that the balance of private and public interest factors “tips overwhelmingly in favor of dismissal.”47 Despite the fact that Texaco’s headquarters was just a few miles from the courthouse where the case was described in a technical report that Texaco provided to the author is questionable, at best, and according to a number of witnesses and reports, it was not followed at many locations, and contaminated liquids were dumped into waterways without sampling or treatment; pits containing high levels of petroleum were backfilled without removing or treating the oil; and some of the oil and contaminated soils and vegetation that were removed were burned in open fires, dumped in nearby forests, or buried in unlined holes in the ground. For a fuller discussion, see Kimerling, *Oil Frontier in Amazonia*, supra note 6, at 493-514 (Part VII).

filed, the judge concluded that the case has "everything to do with Ecuador and nothing to do with the United States."48

Some of the facts used by the court to support its legal analysis are uncontested. For example, there were no allegations of injury in the United States; Texaco built and operated the facilities; and after operations began, Ecuador acquired majority ownership of the assets and continued to operate them after Texaco Petroleum's contract expired. Other facts, however, are in dispute. One area that is especially germane relates to control of the operations. While not determinative, in and of itself, of the legal questions, the factual issue of where decisions were made about the technology and practices that caused the pollution, and who made them, was a material element of the analysis of both private and public interest factors and clearly colored the decision to dismiss.

The proposition, advocated by Texaco and accepted by the court, that Ecuadorians controlled the relevant decisions, that no one from Texaco or anyone else operating out of the United States made any material decisions or was involved in designing, directing, guiding, or assisting the activities that caused the pollution, and that environmental practices were heavily regulated by Ecuador, is a recurring theme. The court also distinguished Texaco from Texaco Petroleum, the subsidiary that operated in Ecuador. That distinction, and the portrait of Texaco Petroleum as basically an Ecuadorian company whose operations were far removed from the parent, is dramatically different from the image of Texaco in Ecuador and the impression there that the State had contracted with the U.S. company, Texaco. It is also at odds with the portrait cultivated by Texaco prior to the litigation, of a multinational industry leader that transferred world class technology to Ecuador. Altogether, the Aguinda court's depiction of Texaco's role in the operations is clearly incongruous with the reality of oil development in Ecuador, including the environmental law vacuum and culture of impunity in the oil frontier, the experience of Amazonian peoples and other Ecuadorians with the company, and the portrait cultivated by Texaco during its tenure there — the triumphalist chapter in the history of oil in Ecuador.49

48. Id.
49. The first judge to consider Texaco's motions to dismiss (Judge Broderick) reserved decision and ordered limited discovery. Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994), adhered to in Aguinda v. Texaco, Inc., 850 F. Supp. 282 (S.D.N.Y. 1994). Although the use and analysis of the discovery by plaintiffs' counsel is disappointing, the exclusive reliance by the district court judge who dismissed the case (Judge Rakoff) on self-serving allegations by the defendant denying responsibility for environmental protection, without contemporaneous supporting documentation or live testimony that could be
The *Aguinda* court's determination that an adequate alternative forum exists was also colored by questionable factual assumptions, including erroneous and unsupported findings of fact about the history of litigation in Ecuador's courts. Specifically, the court found that several plaintiffs had already recovered judgments against Texaco Petroleum and Petroecuador in Ecuadorian courts for claims arising out of the facts alleged by the *Aguinda* plaintiffs, a finding that is clearly erroneous.\(^5\) A related finding, that Ecuadorian oil field workers had won personal injury lawsuits against Texaco Petroleum based on claims of alleged negligence, is not supported by evidence in the *Aguinda* litigation record and is contradicted by the historical record.\(^6\) A third major finding, that the description of systemic shortcomings in Ecuador's legal and judicial system by the U.S. Department of State in its Country Reports on human rights is largely limited to cases involving confrontations between the police and political protestors, is also erroneous and suggests a lack of candor by the court.\(^7\)

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\(^5\) For a fuller discussion, see Kimerling, *Oil Frontier in Amazonia*, supra note 6, at 613-20.

\(^6\) Id. at 539-44.

\(^7\) Remarkably, the court misquotes the State Department report. Judge Rakoff evidently reviewed reports issued in 1999 and 2000, describing human rights practices during 1998 and 1999, respectively. Both reports state that "[t]he most fundamental human rights abuse [in Ecuador] stems from shortcomings in the politicized, inefficient, and corrupt legal and judicial
system.” U.S. Dep’t of State, Ecuador Country Report for Practices in 1999, at 1-2 (2000); U.S. Dep’t of State, Ecuador Country Report for Practices in 1998, at 1 (1999). However, the report (issued in 2000) is quoted by the court as “describ[ing] Ecuador’s legal and judicial systems as ‘ politicized, inefficient, and sometimes corrupt’ so far as certain ‘human rights’ practices are concerned.” Aguinda, 142 F. Supp. 2d at 545 (emphasis added). The misquotation is especially troubling because the same statement was quoted by Judge Rakoff, correctly, on two prior occasions, and the litigation record suggests that the court allotted appreciable attention to considering its proper meaning.

After a political crisis in Ecuador made the headlines (the ouster of President Jamil Mahuad by extra-constitutional means and his replacement initially by a military-civilian junta that included a former Supreme Court judge and, subsequently, by Vice President Gustavo Noboa, who became Ecuador’s fifth president in four years), Judge Rakoff consulted the State Department Country Report on Ecuador sua sponte and reopened the Aguinda record. In a Memorandum Order, he quoted the report (issued in 1999), correctly; explained that the court could not “ignore without further inquiry a statement from a department of the U.S. Government that so fully casts doubt on the independence and impartiality of the principal courts to which the defendant seeks to remit” the case; and invited the parties and Ecuador to supplement the record with submissions regarding whether Ecuador’s courts “might reasonably be expected to exercise” the “modicum of independence and impartiality” necessary to an adequate alternative forum. Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 2000 U.S. Dist. LEXIS 745 (S.D.N.Y. Jan. 31, 2000). The court also asked the State Department to clarify the scope of the statement. Letter from Jed S. Rakoff, United States District Judge, to Edward Scarvelone, Assistant United States Attorney (May 9, 2000). The court’s query correctly quoted the statement again, described it as “a primary conclusion” of the human rights report, and observed that it had been repeated in the report issued in 2000. However, the court added, “the evidence set forth in the report to support this strong statement largely relates to criminal cases,” which are substantially different from the civil claims of environmental damage in Aguinda; “[a]ccordingly, the Court would appreciate any written clarifications the State Department could give as to the scope of the statements” and any information regarding whether Ecuador’s courts would be able to adjudicate Aguinda “in a fair and impartial manner.” Even in “the very different context” of Aguinda, “the Court does not believe that . . . it can ignore without further inquiry a statement from a department of the U.S. Government that so fully casts doubt on the independence and impartiality of Ecuador’s courts. Id. The response by the State Department did not backpedal on the statement or doubts it casts on Ecuador’s courts, nor did it corroborate Judge Rakoff’s intimations that litigation based on environmental claims could somehow be distinguished from the proceedings and circumstances that caused the agency to describe Ecuador’s “legal and judicial system” as “ politicized, inefficient, and corrupt.” In a letter to the court, the State Department explained that, although U.S. Embassies do not “engage in an exhaustive review of the host nation’s judicial system in civil cases,” the portions of the human rights reports that discuss the judiciary are not limited to the criminal arena; “rather, they reflect conclusions drawn from the totality of the Embassy’s exposure to, and analysis of, the host country’s judicial system generally,” and the department regards the reports “as an authoritative reference source.” Letter from Paolo Di Rosa, Attorney Advisor, Office of the Legal Advisor, U.S. Dep’t of State, Western Hemisphere Affairs, to Edward Scarvelone, Esq., Assistant U.S. Attorney (June 8, 2000), submitted to the Honorable Jed S. Rakoff, United States District Court, Aguinda v.
Related findings — that there was no evidence of impropriety by Texaco or any member of the Consortium in any prior judicial proceeding in Ecuador and that numerous cases were pending against multinational corporations without evidence of corruption — are of limited probative value in the absence of meaningful information about the outcomes of those proceedings. The parsed language of the findings appears to evade concerns related to racism and discrimination against indigenous peoples in Ecuador and the culture of impunity in the oil fields. ⁵³ Although the Agunda court’s focus on the litigation record in Ecuador is understandable, as is its preference to avoid

Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y.) [hereinafter Dep’t of State Submission]. A copy of the most recent human rights report was attached to the letter, as well as a copy of the Country Commercial Guide for Ecuador, prepared annually by the Embassy with assistance from several U.S. government agencies “to provide guidance on the commercial environment in the host nation.” Id. The guide described Ecuador’s judicial system as “dysfunctional” and said that long term reform is “desperately needed,” in addition to echoing the language in the human rights reports and cautioning investors about corruption in the courts and other public institutions. U.S. Dep’t of Commerce, Country Commercial Guide, Ecuador FY 2000, in Dep’t of State Submission, supra, tab C, at chs. II.A-3, III.C-5, VII.G-7-8, VII.L-13-14, VII.C-4.

The Agunda court’s query to the State Department can arguably be seen as an invitation to distinguish Agunda from the “strong statement” in the human rights reports ascribing serious and systemic deficiencies to Ecuador’s courts. After the State Department declined to do so, Judge Rakoff evidently took on that task himself, apparently to the point of editing the statement. In addition to mis-quoting the State Department, the court added a qualifier to the statement and a new interpretation that limits its scope to a narrow class of cases: “While the State Department nonetheless continues to describe Ecuador’s legal and judicial systems as ‘politicized, inefficient, and sometimes corrupt’ so far as certain ‘human rights’ practices are concerned, [citation omitted], this is based, as the Country Reports make clear, on cases largely involving confrontations between the police and political protestors.” Agunda, 142 F. Supp. 2d at 545. The qualifier added by the court, however, is contradicted by most of the cases in the human rights reports. Oil Frontier in Amazonia, supra note 6, at 555-62. It is also at odds with the clarification by the State Department and the court’s initial thesis, and is further contradicted by a more detailed report on human rights in Ecuador by the Organization of American States Inter-American Commission on Human Rights (IACHR), portions of which were submitted to the Agunda court by the plaintiffs. See Inter-Am. C.H.R., Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96 doc. 10 rev. 1 (Apr. 24, 1997); Plaintiffs’ (New) Exhibits in Support of Their Memorandum of Law Responsive to This Court’s January 31, 2000 Memorandum Order, Agunda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Mar. 9, 2000).

⁵³ In addition, corruption is notoriously difficult to prove and commonly goes unreported, even when parties are convinced that it has influenced judicial proceedings. Moreover, many plaintiffs in Ecuador do not receive an adjudication of their claims, illustrating the truth of the adage, “justice delayed is justice denied.” Significantly, the support in the litigation record for those findings was limited to affidavits by Texaco Petroleum attorneys and experts.
reliance on generalized allegations of corruption, legal precedents to support the court's sanguine view of litigation in Ecuador evidently do not exist.

Despite a multitude of submissions by Texaco, including ample, but vague, allegations about the litigation record in Ecuador, a gaping hole remained: no final judgment by a court of law in favor of a plaintiff against an oil company based on environmental injuries, or against Texaco (or Texaco Petroleum) in any lawsuit, was submitted by the defendant. The only judgment in the record in favor of a plaintiff — an action by a municipality against Petroecuador and its insurer for damages caused by an oil spill from a former Texaco facility — was vacated on appeal by Ecuador's Supreme Court, which also assessed costs for the defendants' attorneys against the judges who ruled for the plaintiff in the unprecedented environmental action. As a general matter, the notion implicit in the court's analysis, that environmental lawsuits against ChevronTexaco and Petroecuador in Ecuador could somehow be insulated from the social and political context in which they operate and enjoy immunity from systemic deficiencies in the legal and judicial systems, is implausible. Both the historical record and the Aguinda litigation record make

54. See Oral Summary Proceeding, Municipality Joya de las Sachas v. Petroecuador (Supreme Court of Justice, Court of Administration Litigation, Oct. 28, 1998), File No. 1254, No. 172-97 (Ecuador), in Affidavit of Dr. Adolfo Callejas Ribadeneira at Exhibit L (Dec. 28, 1998), in Texaco Inc.'s Appendix of Affidavits, Documents and Other Authorities in Support of Its Renewed Motions to Dismiss, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Jan. 11, 1999) (vacating the proceeding because it should not have gone forward using rules of procedure that allow oral summary proceedings in certain cases, and assessing costs of five million sucres for the defendant's attorneys, to be paid by the lower court judge who adjudicated the case and the judges of the intermediate appellate court who signed the majority opinion upholding the judgment in favor of the plaintiff); see also Sworn Statement by Mr. Luis Tobar Sánchez ¶ 9 (Mar. 27, 2000), in Plaintiffs' Exhibits (Volume II) in Support of Plaintiffs' Reply Memorandum of Law in Further Response to This Court's January 31, 2000 Memorandum Order, Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Apr. 21, 2000) (affidavit by attorney who represented the plaintiff municipality, stating that municipal officials decided not to pursue the case after the judgment was overturned because they concluded that "it was impossible to win an action of that sort"); even if they won again in the local court in an ordinary proceeding, the judgment would not survive appeal by Petroecuador to superior courts in Quito due to the company's political influence there).

The Aguinda court's demand for highly particularized evidence of corruption — to defeat a motion for which the defendant bears the burden of proof — set a burdensome and arguably impossible standard for the plaintiffs, especially considering the difficulty of proving corruption in specific cases, the lack of transparency in Ecuador's courts, and the failure of the discovery order to facilitate access by plaintiffs to that type of information. The absence of judgments in the record to support Texaco's conclusory allegations seems more revealing than the absence of evidence of corruption by Texaco and other multinationals in specific lawsuits.
it clear that the road to effective judicial reform — and the rule of law — in Ecuador will be long and difficult. In the oil frontier in Amazonia, law and politics continue to be characterized by gross inequities that favor oil company interests at the expense of indigenous peoples, *campesinos*, and the environment.\textsuperscript{55}

The *Aguinda* plaintiffs appealed to the Second Circuit Court of Appeals. However, because *forum non conveniens* involves the exercise of discretion by the trial court, appellate courts have limited powers of review. In this case, the Second Circuit found no abuse of discretion.\textsuperscript{56} In a footnote, the appellate court also rejected the plaintiffs' argument that the district court judge, Jed Rakoff, should have recused himself. The plaintiffs had asked the judge to disqualify himself from further proceedings in *Aguinda* after they learned that he attended "an all expense paid resort trip and 'seminar'" at a ranch in Montana sponsored by The Foundation for Research on Economics & the Environment (FREE). FREE is "funded partially by Defendant Texaco, Inc," and Texaco's former Chairman of the Board, Alfred DeCrane, was "one of the principal speakers at the 'seminar.'"\textsuperscript{57} In another footnote, the Second Circuit

\textsuperscript{55} Another finding relied on by the *Aguinda* court, that Ecuador had recently taken steps to further the independence of its judiciary, was technically accurate. The effectiveness of those reforms had not been demonstrated, however, and subsequent political upheavals (resulting in the unconstitutional disbanding of Ecuador's Supreme Court, the installation and ouster of another Supreme Court, and the apparently-unconstitutional removal of the President of Ecuador) show that the *Aguinda* court's optimistic view was premature. That outcome is not surprising because the *Aguinda* court's expectations turned a blind eye to the historical and political context of the reform efforts, including the repeated failure of previous reforms to establish an impartial judiciary and combat corruption generally. Another finding — that there is little chance of corruption or undue influence in lawsuits by *Aguinda* plaintiffs because they will be subject to public and political scrutiny — is similarly speculative and sanguine, and has also been called into question by subsequent events. (Those events relate to the effort by a group of Kichwa and Huaorani to sue ChevronTexaco and Texaco Petroleum in Ecuador, discussed *infra*.) A final finding relied on by the *Aguinda* court to determine that an alternative forum exists, that other U.S. courts have found Ecuador to be an adequate forum, is supported by case law but offers little reassurance because it appears to reflect the relatively light burden on defendants to show the existence of an alternative forum under the *forum non conveniens* doctrine, among other factors, and does not indicate whether plaintiffs in the cited cases have in fact obtained an impartial hearing and adequate remedy in Ecuador's courts.

\textsuperscript{56} *Aguinda* v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002).

\textsuperscript{57} Motion for Disqualification and Supporting Memorandum of Law, *Aguinda* v. Texaco, Inc., No. 93 Civ. 7527 (S.D.N.Y. Sept. 1, 2000); *Aguinda*, 303 F.3d at 480 n.4. Plaintiffs' motion was prompted by an op-ed in the *New York Times* by Abner Mikva, a former chief judge of the U.S. Court of Appeals for the District of Columbia, which criticized free trips by federal judges "to resort locations for legal seminars paid for by corporations and foundations that have
declined to rule on whether the Alien Tort Claims Act encompasses the environmental claims in \textit{Aguinda}, or whether it expresses a strong U.S. policy interest in providing a forum for litigation. Even if those legal arguments were accepted, said the note, the private and public interest factors would nonetheless require the appellate court to uphold the judgment of the district court.\footnote{58}

In its review of the district court judgment, the Second Circuit did not repeat all of the detailed factual rulings discussed above, but it quoted Judge Rakoff’s general finding that \textit{Aguinda} “has everything to do with Ecuador and nothing to do with the United States,” and apparently relied on at least some of the more specific findings to reject the plaintiffs’ appeal.\footnote{59} The Second Circuit also found it “significant” that Ecuador and Petroecuador could be joined in a lawsuit in Ecuador but not in a U.S. forum, because they enjoy sovereign immunity here.\footnote{60} That factor was also cited by the district court and is related to Texaco’s contention that Ecuador and Petroecuador had primary

\footnotesize{an interest in federal litigation on environmental topics . . . [and] devoted to so-called environmental education.” Abner Mikva, Op-Ed, \textit{The Wooing of Our Judges}, N.Y. TIMES, Aug. 28, 2000, at A17; Affidavit of Counsel Cristóbal Bonifaz ¶¶ 2-4 (Aug. 31, 2000), in Motion for Disqualification and Supporting Memorandum of Law, supra. Judge Rakoff denied the motion to recuse, saying that he did not know that FREE “had apparently received some minor portion of its funding from Texaco,” that the seminar he attended was not funded by Texaco, and that he had not discussed the case there. Aguinda v. Texaco, Inc., 139 F. Supp. 2d 438, 439 (S.D.N.Y. 2000). Plaintiffs then petitioned the Second Circuit for a Writ of Mandamus directing Judge Rakoff to recuse himself; the court of appeals denied the petition and plaintiffs’ petition for rehearing \textit{en banc}. Aguinda v. Texaco, Inc., 241 F.3d 194, 198 (2d Cir. 2001). The following day, Judge Rakoff dismissed \textit{Aguinda} (for the second time) in a blistering opinion, discussed supra.}

\footnote{58. \textit{Aguinda}, 303 F.3d at 476 (quoting \textit{Aguinda}, 142 F. Supp. 2d at 537).}

\footnote{59. \textit{Aguinda}, 303 F.3d 470. On remand, the district court conditioned dismissal on Texaco’s agreement to submit to jurisdiction in Ecuador and waive defenses based on any statute of limitations that expired between the date the case began and sixty days after dismissal. \textit{Aguinda}, 142 F. Supp. 2d at 539; see also Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998)(vacating dismissal of \textit{Aguinda and Jota}, a related class action filed by the \textit{Aguinda} plaintiffs’ lawyers in 1994 on behalf of Peruvian plaintiffs, and remanding for reconsideration). The Second Circuit extended that time period from sixty days to one year. \textit{Aguinda}, 303 F.3d at 478-79. Remarkably, in its answer to a new lawsuit filed in Ecuador by forty-six of the \textit{Aguinda} plaintiffs and two additional plaintiffs, discussed infra, ChevronTexaco argues that courts in Ecuador do not have jurisdiction over ChevronTexaco and that the company is not bound by the Second Circuit decision or Texaco’s stipulations in \textit{Aguinda} because ChevronTexaco “is not the [legal] successor of Texaco Inc.” under U.S. law. Answer to the Complaint filed by Maria Aguinda Salazar v. ChevronTexaco Corp. ¶¶ I.1-.4, I.8, IV.1, IV.3-.4, IV.5-.9, Superior Court of Nueva Loja (Ecuador) (Oct. 21, 2003).}

\footnote{60. \textit{Aguinda}, 303 F.3d at 479.}
control of the challenged operations, and, as a result, it would be unfair for a lawsuit to proceed on the plaintiffs’ claims without Petroecuador. Reliance on that factor to favor litigation in an Ecuadorian forum, however, now appears misplaced. Despite representing to the Aguinda court that “Petroecuador can and will be brought into these lawsuits if they are filed in Ecuador,” “[y]ou can’t try these cases without having Petroecuador present,” and “[i]t just is almost a matter of fundamental fairness,” ChevronTexaco has not impleaded Petroecuador in the lawsuit filed in Ecuador by a group of Aguinda plaintiffs after their New York case was dismissed. Instead, ChevronTexaco and Texaco Petroleum filed an arbitration claim against Petroecuador in New York, seeking “to enforce their rights” in the consortium’s operating agreement and require Petroecuador to indemnify all fees, costs, and expenses related to that lawsuit, “including any final judgment that may be rendered against ChevronTexaco in Ecuador.”

In response, Ecuador and Petroecuador sued ChevronTexaco, Texaco Petroleum, and the American Arbitration Association (AAA) in New York State Supreme Court, seeking to stay the arbitration proceeding based on the assertion that Ecuador and Petroecuador had never agreed to arbitrate disputes with Texaco. The defendants removed the case to federal district court, the same court that had dismissed Aguinda. The federal court dismissed the action insofar as it named AAA as a defendant and allowed the plaintiffs to file an amended complaint. The amended complaint raised additional claims and requested a ten-part declaratory judgment that effectively waived sovereign immunity. ChevronTexaco and Texaco Petroleum counterclaimed, alleging breach of contract and failure to indemnify an implied agent, and seeking damages as well as injunctive and declaratory relief. In March 2005,

61. Aguinda, 142 F. Supp. 2d at 551.
the court temporarily stayed the arbitration proceeding while that lawsuit, Republic of Ecuador v. ChevronTexaco Corp., proceeds.64

V. In The Wake of Aguinda: Indigenous Kichwa and Huaorani Unite to Protect and Assert Their Claims

After Aguinda was dismissed, the plaintiffs' lawyers vowed to continue the litigation in Ecuador. In a new spin they declared victory, calling the outcome a landmark decision that, for the first time, ordered a giant oil company to submit to the authority of national courts in a developing country and comply with any judgment that might be imposed.65 In May 2003, forty-six of the Aguinda plaintiffs and two additional plaintiffs filed a new lawsuit against ChevronTexaco in the Superior Court of Justice of Nueva Loja (Lago Agri). The plaintiffs are from four communities: one Secoya and one colonist community in Sucumbios Province and one Kichwa and one colonist community in neighboring Orellana Province. The allegations of injury, however, extend far beyond the plaintiffs and their communities to include all affected areas in the two provinces, and the request for relief is presented "as members of the affected communities and as guardians of those communities recognized collective rights." The affected population whose rights are allegedly being asserted includes "the five indigenous peoples of the area," the Cofan, Huaorani, Kichwa, Secoya, and Siona, as well as colonists. However, no Cofan, Huaorani, Siona, or Napo River Kichwa are included among the plaintiffs, and no damages or other relief are requested directly for the affected communities or indigenous peoples, or even for the plaintiffs.66


65. See, e.g., Kevin Koenig, ChevronTexaco on Trial, WORLDWATCH, Jan.-Feb. 2004, at 10, 11 (article by Amazon Watch staff repeating a number of contentions by the plaintiffs' lawyers).

Instead, the lawsuit seeks a judicial determination of the costs of a comprehensive environmental remediation — including removal of all pollution that threatens human health and the environment, restoration of natural resources, and medical monitoring — and an order directing ChevronTexaco to pay the full amount to a local NGO, Frente de Defensa de la Amazonía (Amazon Defense Front), known locally as “Frente,” which would then “apply” the funds for the ends determined in the judgment. The complaint also claims a 10% share of the remedial monies for the plaintiffs, but requests that those funds also be paid to Frente.67

Frente was founded in 1994 by a group of colonists in Lago Agrio, to establish a local institution to administer monies that they expected to be forthcoming from Aguinda v. Texaco. Led by Luis Yanza, an urbano (urban colonist) who heard about the case in a news report on the radio, Frente has developed close ties with the plaintiffs’ lawyers and some external NGOs, but has no experience with environmental cleanup, natural resources restoration, or medical services. Most importantly, its efforts to claim a monopoly of representation of all people(s) affected by Texaco and to manage local politics in an undemocratic fashion have alienated many people in the affected communities,68 and have been challenged by a growing number of Kichwa and

67. Lago Agrio Complaint, supra note 66, at VI. The decision to award the relief to Frente, which is not a plaintiff, was apparently made by the lawyers without consulting or informing the affected communities. Although Frente has developed alliances with a handful of Cofán, Secoya, and Siona, community involvement in those alliances appears to be limited, at most, and the organization is dominated by colonists.

68. In 1998, Frente issued resolutions “in the name and in representation of the organizations and communities affected” by Texaco, designating exclusive “official spokespersons” for Aguinda in Ecuador. The resolutions also demanded that any initiative by outside groups to help communities affected by Texaco or to “follow” the case be approved by, and coordinated with, Frente and another colonist in Lago Agrio. Amazon Defense Front, Resoluciones Caso Texaco [Texaco Case Resolutions] (Dec. 12, 1998) (on file with author); Amazon Defense Front, Resoluciones [Resolutions] (Feb. 12, 1999) (on file with author). None of the spokespersons were named plaintiffs; two out of six were urban colonists (who are not members of affected communities or part of the putative class).

In 2001, in response to a resurgence of local organizing in the wake of disquieting news that the Aguinda plaintiffs’ lawyers were negotiating a possible settlement agreement with Texaco behind closed doors, Frente organized the “Assembly of Delegates of the People Affected by Texaco’s Petroleum Operations (Assembly of Delegates),” to create the appearance of a “democratic” body that could claim to represent the affected communities and be used to buttress efforts by Frente to build support for a settlement proposal; legitimize decisions made by the lawyers about a possible agreement; speak in the name of all affected groups; administer monies from the litigation; and act as intermediary and gatekeeper between the affected communities and external stakeholders. Despite its impressive name, the “Assembly of
Delegates” has limited participation and is evidently dominated by Frente. At a meeting presided over by Frente, delegates approved “Regulations” declaring that the “Assembly of Delegates” — comprised of twenty-two individuals “from the oil fields” who ostensibly represent colonist communities and one representative each of the Siona, Secoya, Cofan, and Huaorani organizations — “shall be the organic authority for decision-making and representation of all persons affected by the environmental, social, and cultural impacts provoked by Texaco.” The distribution of “delegates from the oil fields” is based on the number of wells in the field and evidently does not take into account factors such as population, length of residence, or land ownership. Reglamento de la Asamblea de Delegados de los Afectados Por las Operaciones Petroleras de Texaco y del Comité Ejecutivo [Regulations of the Assembly of Delegates of the People Affected by Texaco’s Petroleum Operations and of the Executive Committee] at pmbl., arts. 2-4 (Apr. 27, 2001) [hereinafter Regulations] (on file with author).

The rules for decision-making by the “assembly” turn basic principles of due process and decision-making by consensus on their head, run roughshod over the rights of indigenous peoples to participate in decisions that affect them, and disrespect related community norms and aspirations for self-determination. They do not provide for consultation with, or ratification of, decisions by affected communities. Although they state that decisions “shall be taken by unanimous agreement,” they also authorize decision-making by a simple majority of delegates who are present if there is no consensus, and decree that such decisions are “obligatory for all of the affected communities and organizations.” Similarly, the “required” quorum is “one-half plus one” (fourteen) delegates, but if a quorum is not present, the meeting “shall be installed one hour later, with the number of delegates who are present,” if “no fewer than one-third” (nine delegates) are present. As a result, “obligatory” decisions can be adopted (1) over the objection of as many as twelve members of the twenty-six person assembly; or (2) by as few as five persons, in the absence of up to two-thirds of the delegates (including all of the indigenous delegates). The potential for abuse, and due process violations with regard to legal rights, is compounded by the absence of provisions for notice or for recording and disclosing the particulars of a vote and the identity of decision-makers when “obligatory” decisions are adopted. Id. art. 9.

The “Regulations” are written in legalistic language and purport to rest on the “authority” of “the communities and organizations affected by Texaco” but were read to the group at its second meeting and hurriedly approved, without consulting the affected communities. The entire process reportedly took about thirty minutes, and some delegates did not vote. Frente subsequently published the “Regulations;” however, the text simply “certifies” that it was “read, discussed and approved by the delegates of the people who are affected by Texaco’s petroleum operations, meeting on April 27, 2001” in Lago Agrio. It does not disclose who authored the rules; how many delegates were present for the vote; or how many people, or precisely who, in representation of whom, voted to approve them. This reflects a general practice, in which resolutions published by Frente carry the name of the “assembly” and purport to rest on the authority of all affected person(s), but do not clearly identify the decision-makers. Not surprisingly, the first major decision by the “assembly” — after granting itself decision-making powers — was to ratify a vague summary of a settlement proposal that was apparently prepared by the Aguinda plaintiffs’ lawyers and presented to the group as “hecho (already done).” For a fuller discussion, see Kimerling, Oil Frontier in Amazonia, supra note 6, at 652-64 (Part XIII). See also infra note 79.
case but are nonetheless learning about their rights and want to participate in
decision-making about their claims and remedies.

In July 2003, a second lawsuit, against ChevronTexaco and Texaco
Petroleum, was filed in the Superior Court of Justice of Tena by ninety
plaintiffs selected by thirty-one Kichwa and Huaorani communities.69 The
decision by the indigenous communities to file their own lawsuit reflects the
growing consciousness in the oil patch that indigenous peoples have legal
rights, and that Texaco and other companies have duties to them and should
answer to a higher authority — surprisingly radical ideas there, which have
been fostered by both Aguinda and developments in international and
Ecuadorean law that recognize rights of indigenous peoples.

The decision also reflects widespread discontent at the grassroots level with
the conduct of the Aguinda litigation and activities outside court by the
plaintiffs’ lawyers and their NGO supporters that claim to champion the rights
of affected communities but exclude them from decision-making processes.
Two major concerns relate to remedies that might result from the litigation
and a possible (renewed) effort to settle the affected communities’ claims
behind their backs.70 In addition, for indigenous peoples, the appropriation of

69. Plaintiffs’ Complaint to the President of the Superior Court of Justice of Tena, Moi
Vicente Enomenga Mantohue v. ChevronTexaco Corp. & Texaco Petroleum Co. (July 30, 2003)
[hereinafter Tena Complaint].

70. This is not an abstract concern. Since the mid-1990s, there have been seven
negotiations behind closed doors, purportedly to remedy the injuries caused by Texaco, between
the company and elites who professed to represent the interests of affected residents but rebuffed
their calls for transparency and participation. Six negotiations resulted in “remedial”
agreements with public officials; the seventh, with the Aguinda plaintiffs lawyers, reportedly
ended after Aguinda was dismissed by the district court. The six agreements include the
Remediation Contract with Ecuador and Petroecuador, discussed above; four agreements with
municipal governments (in the oil boom towns of Lago Agrio, Francisco de Orellana (Coca),
Joya de las Sachas, and Shushufindi); and an accord with the Prefect of Sucumbios Province.
From the perspective of local residents, none of the agreements remedied injuries that were
caused by Texaco or benefited affected rural communities. Not surprisingly, then, when news
of secret negotiations between Texaco and the Aguinda plaintiffs lawyers reached the oil patch,
many people were uneasy and catalyzed to action. Remarkably, in response to requests from
affected residents for information, the lawyers and Frente denied that the talks were underway.
Subsequently, the lawyers presented a $141 million written settlement proposal to Texaco in the
name of all affected groups; however, despite repeated requests from local residents whose
claims would presumably be settled (and relinquished) as part of the proposed agreement, the
lawyers and Frente refused to disclose the proposal. Instead, they distributed a vague summary
in the oil patch. Although Texaco rejected the settlement proposal after Aguinda was dismissed,
many people remain concerned that negotiations could resume as a result of the Lago Agrio
lawsuit, and that Frente and its lawyers might try to settle their claims without their consent.
their name without authorization is deeply offensive — an offense that is compounded by their belief that the lawyers and NGOs are using their name and suffering for private gain. A related grievance, and longstanding complaint of indigenous peoples throughout Amazonia, is their exclusion from decision-making by outsiders — governments, companies, environmental NGOs, and others — that affects them. In this case, decisions about the conduct of the lawsuit in Lago Agrio could affect not only the territories and natural resources of the Huaorani and Kichwa but also their legal rights.

The plaintiffs in the Tena case came together in the wake of the dismissal of *Aguinda v. Texaco*. The indigenous federation FCUNAE (Federation of Comunales Union of Natives of the Ecuadorian Amazon), comprised of Kichwa communities in the Napo River basin, including Napo Kichwa who are affected by Texaco, organized a series of meetings with groups of communities at locations along the river, to inform them about the latest developments and consider their alternatives. At the request of federation officials, the author participated in the meetings. Three alternatives were suggested for consideration: (1) negotiate with the *Aguinda* plaintiffs' attorneys and Frente to participate in the Lago Agrio lawsuit; (2) present a separate, community-based lawsuit; or (3) take no action. Participants expressed considerable interest in pursuing their own lawsuit and strongly opposed working with Frente and its lawyers.

A follow-up meeting, called "*Reunion de Compromiso con la Demanda* (Meeting for Commitment with the Lawsuit)," was scheduled in Francisco de Orellana (Coca), where FCUNAE's headquarters and the only notary in Orellana Province are located. The Huaorani learned about the meeting when the traditional chief of a community in Cononaco basin saw the author in Coca and asked her to "help the Huaorani like you are helping the Kichwa." The Huaorani, he explained, "are dying from the oil companies and have nowhere to go."

On July 14, 2003, the prospective plaintiffs, sent by their communities from as far as 300 kilometers away, assembled in Coca for the *Reunion de Compromiso*. The Kichwa agreed to work with their Huaorani neighbors in the new lawsuit, launching an unprecedented grassroots alliance that they call "Makarik Nihua." *Makarik* is Kichwa for *luchadores* (fighters); Nihua was a great Huaorani warrior. A request from a group of local colonists, however, who also came to the meeting and asked to join the legal action, was rejected. The indigenous plaintiffs affirmed their desire to work with colonists to

For a fuller discussion of these and related concerns, see Kimerling, *Oil Frontier in Amazonia*, supra note 6, at 652-64 (Part XIII).
defend the rights of all affected groups and secure remedies for shared environmental problems, but wanted their lawsuit to also assert their special collective rights and grievances as indigenous Amazonian peoples. Some people were also concerned that if colonists were among the plaintiffs, another Frente-type group might emerge to try to claim ownership of the lawsuit and relegate the indigenous communities to the margins, in favor of a small group of colonists and corrupt indigenous political elites. Having become cognizant of their rights and catalyzed to action — in significant measure, as a result of *Aguinda* — they were now determined to speak for themselves as indigenous peoples and communities and to become subjects rather than objects of their rights. They further agreed to seek the collaboration of FCUNAE and the Huaorani organization, ONHAE (Organization of the Huaorani Nationality of the Ecuadorian Amazon), in support of their base communities, but resolved to be accountable to the communities and to not relinquish the decision-making power of the communities to officials of the federations.

The group also agreed that the legal action should be part of a broader *lucha* (fight) by the communities to assert their rights, including efforts to build alliances with other affected groups and outsiders who share their concerns. They pledged to respect the right of other affected communities to choose their own representatives, and affirmed that conduct of the litigation and other activities must be clear and transparent, to prevent corruption and ensure "trust in the process" by community members. Finally, they resolved to seek social as well as environmental remedies for injuries that were created by Texaco — and continued by Petroecuador.71

The court in Tena, however, refused to accept the Kichwa and Huaorani plaintiffs' complaint and open a case. Under applicable Ecuadorian procedures, plaintiffs seeking to pursue a lawsuit present their complaint to the court but do not serve the defendant. The judge reviews the complaint and if the elements of the action are present, the court formally initiates the lawsuit and summons the defendant. In the Tena case, the president of the court refused to process the complaint for arbitrary reasons: (1) because the complaint had not been translated into English and defendant ChevronTexaco resides in the United States; and (2) for jurisdictional reasons because the affected lands owned by the plaintiffs' communities include lands beyond the geographic boundaries of the provinces where the court is located.72

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71. The plaintiffs also asked the author to accompany them in the legal process and authorized her to represent them and their communities outside Ecuador's courts.

72. H. Superior Court of Justice of Tena, Presidency, For Plaintiff Dr. Ernesto Lopez Freire (Aug. 26, 2003); H. Superior Court of Justice of Tena, Presidency, For Plaintiff Dr. Ernesto
plaintiffs appealed to the plenary of the court — two judges who were described by a local lawyer as "students" of the president of the court. They upheld the dismissal.73

The Ecuadorian lawyer who represented the plaintiffs, Dr. Ernesto Lopez, a former president of Ecuador’s constitutional court, attributes the dismissal to an "act of corruption."74 The dismissal followed at least three ex parte visits to the Tena court by legal representatives of Texaco. The visits began just a few days after the complaint was filed, while the court was officially closed for a fifteen-day "judicial vacation,"75 and despite the facts that the defendants had not been served with the complaint and the case was not publicized. The plaintiffs do not know who informed Texaco about the action, including the name of plaintiffs’ Ecuadorian counsel, but suspect that the Tena court informed the defendants informally, without the knowledge of plaintiffs’ counsel and without following formal legal procedures.

The plaintiffs appealed to Ecuador’s Supreme Court, where the case languished for more than a year. In December 2004, it was further stalled by a national political and constitutional crisis that has shaken the judiciary and left Ecuador without a lawful Supreme Court for nearly a year.76 In 2006, a

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75. All courts are closed from August 1-15.
76. A special session of Congress summoned by President Lucio Gutierrez voted to remove the Supreme Court judges and name a new court. Constitutional reforms enacted in 1998, aimed at depoliticizing the judiciary, provide life terms for Supreme Court judges and further provide that when vacancies arise, new judges should be appointed by the court. See ECUADOR CONST. OF 1998, art. 202. The fired judges tried to defy the congressional action but were
new Supreme Court sent the case back to Tena with a finding that the local court had acted "irresponsibly" and unlawfully — "gravely disobeying its duty" — when it refused to initiate the lawsuit.77 Plaintiffs' Ecuadorian counsel, however, advised Makarik Nihua that it would be futile and foolhardy to attempt to begin the case again, in the same court against the same defendant, because of the likelihood of further acts of corruption. In addition, the delay caused by the early machinations may have jeopardized the plaintiffs' ability to pursue at least some of their claims before even a theoretically honest court because under Ecuadorian law, limitation periods generally are not tolled until after service of process by the court, an act that was denied to the Tena plaintiffs. Finally, the experience of the plaintiffs in the lawsuit in Lago Agrio, which began with great expectations and fanfare but is now seen by many attorneys as bogged down in civil law procedures that are prohibitively costly, cumbersome, and slow, and thus not suitable for

barred by police from returning to their offices. The crisis reflected and reinforced both the weakness of the judicial branch and the turbulent nature of politics in Ecuador. Gutierrez was "angry that the court [had] sided with opposition politicians in a failed attempt to impeach him" on corruption charges and "contended that the measure was aimed at restoring independence to the court" because the judges were closely aligned with a powerful political party. Juan Forero, Firings on Ecuador's Top Court Stir Opposition Wrath, N.Y. TIMES, Dec. 18, 2004, at A3.

The firings followed mass firings of judges on the Constitutional and Supreme Electoral courts and their replacement by political allies of the President, and "plunged . . . [the] chronically unstable" country "into uncertainty." Id. Critics accused Gutierrez of trying to consolidate power but initially, the firings did not generate popular outrage because many Ecuadorians see the courts as politicized and corrupt, and regarded the conflict as a fight between political elites. However, after the new Supreme Court invalidated corruption charges against a former President, Abdala Bucaram, and he returned to Ecuador from exile, demonstrations in the capital surged. In response, the President and Congress dissolved the new Supreme Court, and resolved to create a new legal mechanism to choose a new court. The move failed to subdue the protesters, who were fed up with corrupt, inept governments and economic hardship. Demonstrators accused Gutierrez of corruption and dictatorship and called for removal of the President — and all politicians in the executive, legislative, and judicial branches — chanting, "Que se vayan todos (Out with all of them)" and "No mas de lo mismo (No more of the same)." On April 20, 2004, a special session of Congress voted to remove Gutierrez on the dubious constitutional ground of "abandonment" of his post. The military withdrew its support from Gutierrez, and he became the third elected president since 1997 to be ousted from power. Vice President Alfredo Palacio became Ecuador's seventh President in eight years. Because of "bitter divisions" in the Congress, however, a new Supreme Court was not installed until November 30, 2005. Juan Forero, Ecuador: A New Supreme Court, N.Y. TIMES, Nov. 30, 2005, at A14.

77. Supreme Court of Justice, First Civil and Commercial Chamber, Dr. Ernesto Lopez, attorney for Moi Enomenga Mantohue and others (Jan. 31, 2006) (on file with author).
mass toxic tort litigation, further convinced plaintiffs’ counsel that it would be naive and misleading for him to attempt to pursue the Tena case, and that without at least one million dollars (which the plaintiffs do not have), it would be impossible for them to retain lawyers in Ecuador to assume that task in a responsible and professional way. 78

VI. Outside Court and Other Courts

For Makarik Nihua, the refusal by the Tena court to hear their case was like a slap in the face. Many people expressed “hurt” and “sadness” that their own judicial “authorities” refused to “listen” to their grievances and “atender (attend to)” their petition for justice. Although belief in their basic rights remains strong, the decision by the Tena court cast renewed doubt on the value of those rights in Ecuador’s legal and judicial system, misgivings that have been compounded by developments in Lago Agrio. There, the authorities of another province are “hearing” a case by a relatively small group of plaintiffs that includes claims based on injuries to the Kichwa and Huaorani communities, without their consent, and which asks for payments to Frente to remedy their grievances. From the communities’ perspective, Texaco and Ecuador ran roughshod over their rights for decades; then, their claims against the company attracted outsiders who profess to champion their rights but refuse to listen when indigenous communities want to speak for themselves and even claim to represent them against their wishes, or, in the case of external NGOs, help colonizers (Frente) “take their name” against their wishes. Subsequently, when a substantial sector of the indigenous peoples of Orellana Province stepped forward to speak in their own voice and become protagonists in the celebrated fight to assert their rights and remedy their injuries, their own judicial authorities also refused to listen, and turned them away after meeting privately with lawyers for Texaco.

At the same time, activities outside court to publicize and garner support for the lawsuit in Lago Agrio have aggravated feelings of marginalization and exploitation among the Kichwa and Huaorani. The Aguinda lawyers, Frente, and their new U.S. NGO partner, Amazon Watch, have mounted a major public relations campaign that represents the new case as the continuation of Aguinda v. Texaco, on behalf of all (30,000) affected residents. As part of that

78. See Lopez Declaration, supra note 74. Dr. Lopez further counseled the plaintiffs not to count on the Supreme Court that had found in their favor to protect their rights in the future, because it probably would not survive Ecuador’s next change in government, scheduled for 2007; and that applicable legal procedures do not permit them to intervene as plaintiffs in the lawsuit in Lago Agrio.
effort they claim, falsely, that the Lago Agrio lawsuit was “brought by five indigenous groups and eighty communities,” and cultivate the misleading impression that Frente (or its “Assembly of Delegates”) represents all of the

79. Amazon Watch & Amazon Defense Front, Clean Up Ecuador Campaign: Background on the Historic Trial, http://www.chevronxicocom/article.php?id=55 (last visited Feb. 8, 2007); see also Amazon Watch, Clean Up Ecuador Campaign: Campaign, http://www.chevronxicocom/article.php?id=111 (last visited Feb. 8, 2007) (contending that Amazon Watch has “forged successful partnerships in Ecuador” with “the indigenous federations representing the Cofan, Huaorani, Siona, Secoya, and Quichua [Kichwa] peoples,” as well as with Frente, Accion Ecologica and the Center for Economic and Social Rights; also featuring a photograph of Huaorani). In Ecuador, the environmental NGO Accion Ecologica is Frente’s leading ally in the campaign to support its lawsuit. That campaign makes similar claims about the Lago Agrio case and also excludes Makarik Nihua.

80. As discussed supra, the “Assembly of Delegates” was organized by Frente in 2001 (with financial support from Oxfam America), and has limited participation and controlling rules for decisionmaking. By “regulation,” Frente is “the technical and administrative unit in charge of [both] obtaining the information” needed by the “Assembly of Delegates” and its executive committee, and “executing and coordinating the activities derived from” their decisions. Regulations, supra note 68, arts. 7-11.

The rules for decision-making by the “assembly,” summarized supra note 68, not only contradict commonly-expressed local political aspirations that favor decisionmaking by consensus and respect for decisions made at the community level, but also abrogate the rights of dissidents to pursue their own claims. Although clearly at odds with basic principles of due process and, therefore, legally dubious at best, the bald assertion of decision-making power by Frente and its “Assembly of Delegates” could nonetheless affect the rights and interests of affected groups and individuals because it is supported, and in the eyes of many, orchestrated by, the Aguinda plaintiffs’ lawyers. For indigenous communities, that assertion of power not only raises troubling questions related to the adequacy of representation and basic due process protections, but also threatens to eviscerate their rights as indigenous peoples by allowing “obligatory” decisions about their rights and claims to be made entirely by outsiders. In addition to denying representation (and decision-making power) to the largest indigenous group, the Kichwa, the “Regulations” for the “assembly” grant the Huaorani, Cofan, Secoya, and Siona the appearance of representation, but take away their right to make their own decisions and authorize a small number of colonists to make decisions that purport to bind them. Significantly, the delegates who were invited by Frente to represent the affected indigenous peoples in the “assembly” do not have enough votes under any decision-making scenario allowed by the “Regulations” — even if all four delegates are in agreement and they have proper authorization from the communities and peoples they ostensibly represent — to either constitute a majority to adopt a decision or to block a decision favored by a group of colonists with which they disagree. Not surprisingly, the “Regulations,” and claims that Frente and the “Assembly of Delegates” represent all affected groups, have been rejected by Makarik Nihua, FCUNAE, and ONHAE. See, e.g., FCUNAE, XX Asamblea Ordinaria De FCUNAE, En Comuna Patas Yacu, Del Canton Orellana, Del 13 Al 15 De Junio De 2001, Plenario Y Resoluciones De Las Comisiones [20th Ordinary Assembly of FCUNAE, in Comuna Patas Yacu, Canton Orellana, June 13-15, 2001, Plenary and Resolutions of the Commissions] at 2.12-2.17 (June 15, 2001)
indigenous peoples (and colonists) who are affected by Texaco.  

(letters file author); Letter FCUNAE to Luis Yanza, Amazon Defense Front (July 15, 2001) (letter file author); Makarik Nihuia, Segunda Asamblea de Makarik Nihuia realizado en la ciudad de Francisco de Orellana, sede de FCUNAE; los días 28 y 29 de junio de 2004 [Second Assembly of Makarik Nihuia in Francisco de Orellana, FCUNAE headquarters; June 28 and 29, 2004] at 2 (letter file author); Carta de la Nacionalidad Huaorani al Gobierno de Alfredo Palacio, a la Nación Ecuatoriana y al Mundo Por la Autodeterminación de la Nacionalidad Huaorani y Contra Petrobras en el Bloque 31 [Letter from the Huaorani Nation to the Government of Alfredo Palacio, the Ecuadorian Nation and the World, For Huaorani Self-Determination and Against Petrobras in Block 31], July 12, 2005, at no. 8 (letter file author); Makarik Nihuia, Resoluciones de la Cuarta Asamblea de Makarik Nihuia en la Comuna San Carlos 16 de enero de 2006 [Resolutions Fourth Assembly of Makarik Nihuia in Comuna San Carlos, Jan. 16, 2006] (hereinafter Resolutions Fourth Assembly of Makarik Nihuia); Makarik Nihuia, Denuncia de Makarik Nihuia [Denunciation Makarik Nihuia] (delivered July 10, 2006); Makarik Nihuia, Mensaje de las Comunidades Kichwas y Huaoránis de Makarik Nihuia al Foro Internacional Petróleo, Derechos Humanos y Reparación Ambiental, Fco. De Orellana (Coca), 20, 21, y 22 de Octubre de 2006 [Message From the Kichwa and Huaorani Communities of Makarik Nihuia to the International Forum Petroleum, Human Rights and Environmental Reparation, Fco. de Orellana (Coca), October 20, 21 and 22, 2006] (hereinafter Makarik Nihuia Message).

81. See, e.g., Amazon Watch & Amazon Defense Front, Clean Up Ecuador Campaign: The Affected Communities, http://www.chevron.toxico.com/article.php?id=56 (last visited Feb. 8, 2007); Amazon Defense Front, About Us, http://www.amazonwatch.org/about_us/ (last visited Feb. 8, 2007); Press Release, Amazon Watch, “Our People Are Dying . . . .”: Ecuadorian Indigenous Leaders Arrive in Bay Area to Urge ChevronTexaco to Clean Up Toxic Waste in Amazon Region: Indigenous Leaders Will Provide Briefing on Their Historic Billion-Dollar Class Action Suit Against the Petroleum Polluter That’s Killing Their People (Dec. 9, 2002) (publicizing a visit to the Bay Area by three “indigenous leaders” and identifying Frente’s Luis Yanza, a mestizo and urban colonist who is not a member of an affected community, as an “indigenous leader” and “affected communities spokesperson;” also asserting that Yanza and the two other “indigenous leaders,” none of whom are plaintiffs, “filed” Aguinda on behalf of 30,000 Ecuadorians; referring to indigenous leaders, populations or tribes ten times but not mentioning affected colonists; and stating that, “at last these indigenous leaders will have the opportunity to speak on behalf of their culture and people and provide first-hand accounts of how ChevronTexaco has decimated their land, their culture and their lives”); Koenig, supra note 65; Press Release, Amazon Watch, Amazon Watch Calls on ChevronTexaco to Address Cancer Outbreak in Ecuador: New Health Study Finds Child Cancer Rising Rapidly in Area Where ChevronTexaco Operated: 91 Child Cancer Cases Reported, Many Under Age of 5: Study Released During $6 Billion Lawsuit (Sept. 30, 2004); Press Release, Amazon Watch, Pressure Mounts on ChevronTexaco to Confront its Responsibility for the “Rainforest Chernobyl”: $6 Billion in Potential Liability for World’s Largest Oil Disaster: Rising Tide of Institutional Investors Call on CEO David O’Reilly to Report on Environmental Impacts of An Eco-Disaster Said to be Far Worse Than Exxon Valdez: Human Rights Campaigner Bianca Jagger Calls on CEO to Remedy This Catastrophe: “Whilst Mr. O’Reilly is Stalling, People are Dying in the Ecuadorian Amazon”: After Years of Suffering, Indigenous Chief Will Finally Face Down
estimate the cost of the environmental remediation sought by the legal action at more than six billion dollars. However, the basis for that estimate is murky, and despite representations to the public and the media that a "Remediation Plan" was prepared for the court in 2003, there is no remediation plan or process underway to inform and consult the affected communities and develop a serious plan. Efforts by the Kichwa and Huaorani to get information about remedial measures that underlie the estimate and engage Frente and its lawyers in a dialogue about remedial alternatives have been rebuffed.82

O'Reilly in Person on Wednesday (Apr. 26, 2004); Press Release, Amazon Watch, Environmental "Trial of Century" Pits 50,000 Ecuadorian Rainforest People Against ChevronTexaco . . . : Bianca Jagger To Visit Amazon Jungle in Ecuador: Case of Rainforest Peoples Against ChevronTexaco to Begin Oct. 21 in Lago Agrio, Sucumbios: First Time U.S. Oil Company Forced to Face Judgment in Ecuador Court: Jagger to Meet with Indigenous Leaders and Tour Communities Ravaged by Illegal Dumping on Oct. 9th-10th (Oct. 8, 2003); Amazon Watch, Media Advisory (Oct. 7, 2003); Press Release, Amazon Defense Front, Caution Issued to Chevron Shareholders: New Ad Campaign Warns Chevron That It Must Pay Billions For Texaco's Dumping In Amazon Rainforest: Texaco's Huge Liability Poses Major Obstacles For SEC Approval Of Merger With Chevron: Texaco Again Charged With Race Discrimination (Aug. 9, 2001). For similar contentions by the plaintiffs' lawyers while the U.S. case was underway, see Kimerling, Oil Frontier in Amazonia, supra note 6, at 474-84 (Part V).

82. In October 2003, at a public forum organized by Makarik Nihua, Frente's president was asked about the group's plans for a cleanup in the event of a victory in court. His response, that "the lawyers are the ones who can answer because they know what they are planning," suggested that Frente either did not have a remediation plan and/or proposal under development or that it had one but was unwilling to disclose it. Two weeks later, Frente issued a press release announcing "The week of Truth for ChevronTexaco," to publicize the first public proceedings in the Lago Agrio case. Highlights included "Presentation of the Remediation Plan." Press Release, Amazon Defense Front, La Semana de Verdad para ChevronTexaco; Testimonios siguen, Plan de Remediación se presenta y los demandantes se movilizan; Bianca Jagger, la lider de los derechos humanos internacionales regresa al Ecuador para apoyar a los demandantes [The Week of Truth for ChevronTexaco; Testimonies Continue; Remediation Plan Is Presented and the Plaintiffs Mobilize Themselves; Bianca Jagger, the International Human Rights Leader Returns to Ecuador to Support the Plaintiffs] (Oct. 27, 2003) (on file with author). The author received a copy of the release from another NGO and contacted Leila Salazar of Amazon Watch, who was named as a press contact, to request a copy of the plan. Salazar responded by sending what she called "the summary of the preliminary remediation plan" (in English and Spanish). E-mail from Leila Salazar to Judith Kimerling (Jan. 13, 2004); Global Environmental Operations, Inc., Remediation in Former Texaco Concessions in Ecuador: A Preliminary Assessment (undated). The "summary" estimated cleanup costs at $6.114 billion and was evidently submitted to the court in support of the plaintiffs' request for remedial funds. The entire document, however, was less than four pages and failed to disclose important information and details about the "Remediation Plan," including the locations that were slated for cleanup. The author then requested a copy of the complete plan and information about mechanisms to inform and consult with affected communities. E-mail from Judith Kimerling to Leila Salazar
This effort to claim a monopoly of representation and paint a grassroots, indigenous veneer on the Lago Agrio lawsuit and activities by Frente and its NGO allies has continued despite (1) repeated protests and exhortations by FCUNAE, Makarik Nihua, and growing numbers of Huaorani (including official of ONHAE) to stop using the name of all affected groups and to respect community decisions to choose their own representatives and assert their rights to participate in decisionmaking about their claims and remedies; (2) the refusal by FCUNAE’s president, despite considerable pressure, to endorse the case or sign a “contract” with the plaintiffs’ attorneys to continue the Aguinda litigation in Ecuador; 83 (3) the decision by a substantially larger group of Kichwa and Huaorani claimants to pursue a separate, indigenous lawsuit and organize their own community-based alliance; (4) the fact that Frente is a colonist organization with limited legitimacy in the oil patch, especially among grassroots indigenous populations; and (5) the decision by the lawyers to ask the Lago Agrio court to award the relief to Frente, to not request compensation for affected residents, and to limit the plaintiffs to forty-eight individuals who do not include legitimate representatives of most affected groups.

Those activities have succeeded in maintaining a spotlight on the Lago Agrio lawsuit and grievances of the affected communities, especially affected indigenous peoples, 84 and in building new political alliances to pressure

(83) **See** Contrato Para Litigar El Caso En Contra De Texaco En El Ecuador [Contract to Litigate the Case Against Texaco in Ecuador] (undated) (unsigned sample contract provided by Frente to FCUNAE) (on file with author).

(84) As discussed **supra**, the Aguinda v. Texaco plaintiffs’ attorneys commonly attributed their allegations to “Indians” and “tribal leaders” without mentioning affected colonists. Amazon Watch materials occasionally refer to both indigenous peoples and campesinos (small farmers) but usually do not, and the NGO commonly uses the term “rainforest peoples” to refer to the claimants and affected communities, in an apparent attempt to put an indigenous face on the Lago Agrio lawsuit and its activities to support the case. The NGO also features
ChevronTexaco outside court to clean up Texaco's mess. However, the Kichwa and Huaorani communities of Makarik Nihua have been excluded from the alliances that profess to support the affected communities, and remain in the shadows of the spotlight.\textsuperscript{85} In addition, the portrait — in the spotlight — of the grievances and lucha of the affected groups has been colored by the views and private interests of their self-appointed champions and has offended a significant sector of the indigenous peoples whose rights and interests are purportedly being defended.\textsuperscript{86} As a general matter, activities by the NGOs have continued the dynamic that emerged during \textit{Aguinda v. Texaco} of claiming to support the affected communities but essentially leaving the conduct of the litigation, including development of a remediation plan, to the lawyers, as if a victory in court or a settlement with plaintiffs' counsel would automatically benefit all affected people(s) and the rainforest environment.\textsuperscript{87}

\textsuperscript{85} See, e.g., Shelley Alpern, \textit{Trillium Asset Management Joins Investor Delegation in Ecuadorian Amazon to Investigate Claims that ChevronTexaco Polluted Ecosystem, INVESTING FOR A BETTER WORLD} (Trillium Asset Mgmt., Boston, Mass.), Apr. 2004 (reporting on a "fact-finding trip" to Ecuador organized by Amazon Watch for ChevronTexaco shareholders and stating, inaccurately, that the company "is being sued in a class-action case [in Lago Agrio] representing 30,000 indigenous inhabitants" of the rainforest region). The shareholders visited Coca but were not told about the Tena case or Makarik Nihua, and Trillium subsequently sponsored a shareholder resolution calling on the company to "report on new initiatives . . . to address the specific . . . concerns of villagers living near . . . sources of contamination in the area where Texaco worked in Ecuador." ChevronTexaco Corp., Proxy Statement (Schedule 14A), at 51 (Mar. 26, 2004).

\textsuperscript{86} The Napo Kichwa and Huaorani are by far the largest indigenous groups affected by Texaco, in terms of both population and territory.

\textsuperscript{87} See, e.g., E-mail from Leila Salazar to Friends of Amazon Watch (Oct. 21, 2003) (on file with author); E-mail from The Amazon Watch Team to Friends of Amazon Watch (Oct. 21, 2003) (on file with author). At the same time, activities by plaintiffs' counsel and their NGO supporters continue to reflect limited knowledge of the affected indigenous peoples' cultures, communities, and natural world and threaten to obscure the complexities of social and environmental issues in
In April 2006, Cristobal Bonifaz, who was co-counsel for the plaintiffs in *Aguinda* v. *Texaco* and for Frente and the Lago Agrio plaintiffs until March 2006, filed a new class action lawsuit against Chevron, *Doe* v. *Texaco*, in federal court in San Francisco, with nine named plaintiffs, all colonists, who suffer from cancer or an increased risk of cancer that they attribute to pollution from Texaco’s produced water wastes in Ecuador. The complaint was based on claims of unjust enrichment and violation of California’s Unfair Competition Law, and asked for disgorgement of the unlawful profits to build medical facilities in the impacted region where the plaintiffs live. The court dismissed the complaint for failure to state a claim on which relief could be granted but allowed the plaintiffs to amend their complaint. The amended complaint also arises out of injuries related to cancer and increased risk of cancer, but is not a class action and is based on common law claims of negligence, intentional or reckless infliction of emotional distress, and battery. It seeks equitable relief in the form of a medical monitoring trust fund to

the oil patch, including challenges related to (1) representation of diverse, multi-ethnic populations in a large area; and (2) the need to develop consensus about priorities for remedial measures. The risks presented by inattention to those complex realities — and related legal and ethical challenges — have increased since the dismissal of *Aguinda* v. *Texaco* in favor of litigation in Ecuador because, although basic principles of due process are recognized under Ecuadorian law, unlike U.S. class action law, clear procedures and precedents to protect absent parties who could be affected by group litigation are not well developed.

Amazon Watch began its “Clean Up Ecuador” campaign in 2002 and initially pledged to support all affected groups and to respect grassroots decisions and concerns, including longstanding concerns related to representation. However, the *Aguinda* attorneys subsequently obtained the services of a public relations firm to work with the NGO. Although Amazon Watch continues to describe its campaign as an initiative to support the demands of the affected communities, and now also claims (falsely) to work in partnership with all of the indigenous federations that represent the affected indigenous peoples (including the Huaorani and Kichwa), since the Lago Agrio lawsuit began, it has made support for that case the centerpiece of its campaign and appears to have become a megaphone for the plaintiffs’ lawyers. See generally Amazon Watch, http://www.amazonwatch.org (last visited Feb. 8, 2007); Clean Up Ecuador Campaign, http://www.chevroninxico.org (last visited Feb. 8, 2007). In addition to in-kind support to publicize the NGO’s activities, Amazon Watch has evidently received funds from Kohn, Swift and Graf, co-counsel for the *Aguinda* plaintiffs. 2003 ANNUAL REPORT, supra note 84, at 10; 2002 ANNUAL REPORT, supra note 84, at 15.


89. See id. In 2005, ChevronTexaco changed its name to Chevron. The complaint also names Texaco, Inc. and Texaco Petroleum Company as defendants; those companies have been wholly owned subsidiaries of ChevronTexaco (now Chevron) since the 2001 merger between Texaco, Inc., and Chevron Corp., but appear to be paper corporations that have not carried out any operations since the merger.
establish medical facilities in the affected region, or compensatory and punitive damages.90 The defendants moved to dismiss the case, alleging that it is time barred under California and Ecuador law. The court denied the motion and ruled that the jury must determine, as to each plaintiff, whether the onset of cancer occurred before April 25, 2002, four years before the lawsuit was filed. If the cancer developed after that date, the plaintiff’s claim would not be barred.91 Interestingly, ChevronTexaco has not moved to dismiss that case on the ground of forum non conveniens. Trial is scheduled for January 2008.

The Doe plaintiffs sought to protect their identities from Frente and proceed with their lawsuit using pseudonyms. In a sworn declaration to the court, Bonifaz recounted some of the history of Aguinda and the Lago Agrio lawsuit to explain why the Doe plaintiffs “have a genuine concern that they would face harassment and retaliation, including physical retaliation, if their names and/or other identifying information were to be publicly disclosed.”92 Although the motion to proceed anonymously was denied, the allegations by Frente’s former counsel are troubling for Makarik Nihua and raise additional concerns about the litigation in Lago Agrio:

The Frente has repeatedly claimed to the Ecuadorian public and media that the Lago Agrio litigation will result in a six billion dollar judgment against Chevron. In Ecuador, the prevailing public expectation is that the Frente will soon control billions of dollars. As a result, the organization has become a powerful political force . . . .

... The Frente is likely to see this action [Doe v. Texaco] as a threat to the money and political power that it has gained and/or hopes to gain from the Lago Agrio litigation. I believe that if the

90. Order Granting Motion to Dismiss and Denying Motion to Stay, Jane Doe v. Texaco, Inc., No. C 06-02820 (N.D. Cal. July 21, 2006), 2006 WL 2053504; Plaintiffs First Amended Complaint, Jane Doe v. Texaco, Inc., No. C 06-02820 (N.D. Cal. July 28, 2006), 2006 WL 2805517. The complaint also seeks costs of the suit, including attorneys’ fees. Plaintiffs Jane Doe I and II have breast cancer; Jane Doe III has uterine cancer; Jane Doe IV has lymphoma and thyroid cancer; Jane Doe V’s minor son has leukemia; and Plaintiffs John Doe I-IV are married to Jane Doe I-IV, respectively. Id.


identities and addresses of Plaintiffs in this action are disclosed, the Frente will attempt to intimidate and harass Plaintiffs. 93 Notwithstanding those political developments, the lack of external support for Makarik Nihua, and their legal setback in Tena, the Kichwa and Huaorani alliance has grown stronger internally, with most of the communities reaffirming their resolve to work together to assert and protect their rights. They have organized assemblies, marches, and delegations, and studied, distributed — and even generated — written documents. 94

93. Id. ¶¶ 12, 13; see also Supplemental Declaration of Cristóbal Bonifaz in Support of Plaintiffs’ Reply to Defendants’ Opposition to Plaintiffs’ Motion to Proceed With Action Using Pseudonyms ¶ 7, Jane Doe v. Texaco, Inc., No. C-06 2820 (N.D. Cal. Sept. 14, 2006) (explaining counsel’s discharge by Frente and declaring, “If Plaintiffs’ names were made known, I have no doubt that the Frente would seek to relentlessly intimidate and harass the Plaintiffs as a means of retaliation for their continuing relationship with this counsel.”). The case is currently proceeding sub nom. Luisa Gonzalez v. Texaco, Inc. The judge in the case is William Alsup.

94. Both Huaorani and Kichwa cultures are oral, but they have learned the power of the written word when dealing with outsiders. For example, in an assembly in January 2006, the communities resolved to put their grievances against Frente and Amazon Watch into writing and to publicize the denunciation. For years, the NGOs had disregarded their complaints and concerns, and treated them and their lucha as if they were invisible. A document, they reasoned, would strengthen their fight to have their voices heard and help them put an end to misrepresentations by those groups. Resolutions of the Fourth Assembly of Makarik Nihua, supra note 80. The denunciation pursuant to the resolutions (1) denounces Frente for “taking the name of all of the people who are affected by Texaco and claiming to sue for our rights without authorization;” (2) rejects the Assembly of Delegates organized by Frente; (3) denounces Amazon Watch for “helping” Frente “take the name of all of the people who are affected by Texaco, for spreading falsehoods about the lucha of the communities, and for securing and managing [financial] resources in the name of the lucha of the indigenous peoples against ChevronTexaco”; and (4) insists to Frente that it “respect the decisions of the Lower Napo Kichwa communities and Huaorani People,” that it “stop taking the name of all of the people who are affected by Texaco,” that it inform them and the author about what it will do if it wins its lawsuit in Lago Agrio because “this can affect our environment and well-being," that it “not go about misleading people and speaking falsehoods,” and that it “no molesta (not bother us) or enter our territories without written permission.” Makarik Nihua Denunciation, supra note 80.

A second document was prepared for an international public forum held in Coca in October 2006, the First International Forum on Petroleum, Human Rights and Environmental Reparation. The forum was convened by Frente, Accion Ecologica and sixteen other organizations, to “open a space” for people(s) affected by petroleum activities to come together to develop strategies to defend their human, environmental, and collective (indigenous) rights. Another objective, and reason for meeting in Coca, was to strengthen the lucha by the local communities who are suing ChevronTexaco. Promotional materials published on the web anticipated some 400 participants from thirty-six countries, including delegations from a number
NGOs of local colonist and church-affiliated groups (also named as convening organizations), and NGOs based in Quito. Makarik Nihua, however, was not invited. When they learned about the forum (from a U.S.-based Native American NGO), Makarik Nihua asked one of the sponsors, Ecumenical Commission for Human Rights (CEDHU), to arrange a meeting with the key organizers of the event, to explain why they felt Makarik Nihua should be invited and to ask to address the forum. At the meeting, only CEDHU supported their request to allow a Kichwa and a Huaorani representative to speak for five minutes each. The other NGOs — Accion Ecologica, Oilwatch, Frente, SERPAJ, INREDH, and Orellana Human Rights Committee — argued that if they allowed the Kichwa and Huaorani to speak, even for two minutes, “then everyone would want to speak.” No one inquired about what the Huaorani and Kichwa might want to say, but they insisted that their organizations all work to defend the rights of indigenous peoples. In response, Makarik Nihua decided to prepare a written message to the forum and to organize a protest, if needed, to demand to be heard. They knew that unless they spoke for themselves, Frente would speak to the forum in their name. They organized a group of thirty-six Huaorani and Kichwa from eleven of the communities nearest to Coca to come to the forum, and enlisted the support of FCUNAE and ONHAE. Faced with the prospect of an embarrassing protest by representatives of the local indigenous peoples, the organizers finally agreed to allow a Kichwa and a Huaorani representative to speak.

The written message explains that the Kichwa and Huaorani were the first peoples to be affected by petroleum activities in the area, now known as Orellana Province; that everything changed for them after Texaco arrived; and that Makarik Nihua is comprised of twenty-eight communities who have united to defend their human, environmental, and collective rights. It continues:

We are thankful that there is a lot of national and international concern for the communities who are affected by Texaco and that many people have come to our Amazonia [to the forum] to know and help the peoples who are affected by petroleum activities. But we are hurt that they did not invite us, the ancestral peoples of this area, who have our own process to fight to defend our rights and solve the problems brought to our Amazonia by Texaco and other oil companies. We had to fight to speak at this forum, to bring our message with our voice. We asked to speak for ten minutes, but the convening organizations denied our request. We do not understand why they come to our home to defend the rights of the [indigenous] peoples but do not want to get to know our organization, Makarik Nihua, or listen to our voice. We are sad that many organizations that claim to defend our rights do not take us into account. It is as if they want to do business with our suffering. They speak in the name of the affected indigenous communities but do not want to listen when we want our voice to be heard.

Makarik Nihua Message, supra note 80. The message continues by explaining that Makarik Nihua had been working, as communities affected by Texaco, for three years, initially in an unsuccessful effort to sue Chevron Texaco in Tena, and most recently with a petition to intervene in litigation between Ecuador and Petroecuador and Chevron Texaco in New York (discussed infra). It states that the communities are aware of the lawsuit in Lago Agrio but explains why they do not feel represented or respected by Frente and its lawyers, why they reject the Assembly of Delegates organized by Frente, and why they “feel used by Frente and its NGO friends.” The message concludes by affirming that the communities want to fight for an environmental remediation, as well as for social and cultural remedies, “but we want to
Participation by Huaorani communities has grown considerably, especially in the Cononaco and Napo river basins, as word of the new alliance has spread. Both the commitment to work at the community level and the inclusion of Huaorani plaintiffs and speakers have been significant factors in motivating the Huaorani. Other motivating factors include repeated oil spills from Texaco’s aging facilities, and gatherings in which groups of Huaorani come together to unite over shared concerns and elders recall their histories with the missionaries and the company.  

95. Like many indigenous groups, the Huaorani have long resisted, and resented, efforts by outsiders to speak in their name. They have also struggled against efforts pioneered by oil companies and apparently adopted, at least in part, by Fronte, to try to “comprar (buy)” ONHAE officials and use the organization to create the appearance of support among the Huaorani (or “authority”) for their activities. The Huaoranis of Makarik Nihua are angry at Fronte and its leader, Luis Yanza, because, in their words, “Yanza speaks for all but works with few,” “promises to share a lot of money with ONHAE officials in order to change their thinking,” and is “mentiroso (a liar).” Like the Kichwa, they are offended by the complaint in Lago Agrio because it includes claims based on injuries to them, but they were not consulted, there are no Huaorani plaintiffs, and in the event of a victory, the monies for their remedies would be paid to Fronte; in addition, both groups say that Fronte and its lawyers do not know their communities or their “reality,” so “how can they solve our problems?” The Huaorani also complain that Yanza “invites Huaorani to many lunches” and on trips to Lago Agrio and the United States but does not “trabaja bien (work in a good way)” or consult with affected communities; claims to represent the Huaorani against their wishes; uses images of the Huaorani without permission; and seeks to profit from their grievances. For a letter to Yanza protesting how a visit to the United States was handled and exhorting Fronte and Amazon Watch to remove the name and photographs of Huaorani from their websites, see Letter from Manuela Omari Ima, President, Association of Waorani Women of the Ecuadorian Amazon (AMWAE) to Luis Yanza, Amazon Defense Front (Jan. 22, 2007) (on file with author) (also protesting because Fronte and Amazon Watch are using the name of the Waorani without permission and “without helping us,” and adding, “Nor do [your organizations] know the Waorani communities or territory. But your [website] propaganda lies, it wants to trick people with good intentions who do want to help the Waorani;” further stating, with regard to the trip (which took place in 2004), that she accompanied Yanza to the United States because he offered to give her a computer for ONHAE, but never but did, causing her family and co-workers to complain that she went simply because she felt like it; that she did not understand the events well because she does not speak English, but that Yanza and Amazon Watch pressured her to present herself in Huaorani dress and chant in her language, and she could see that they asked for funds (at an event in New York); asking how much money they had raised and what happened to it; and stating that she felt used by them but that they “cannot trick us any more.”).  

In a recent example, in October 2006, Yanza offered to give ONHAE officials “1,000 boots”
On October 12, 2006, 118 representatives from twenty-eight Huaorani and Lower Napo Kichwa communities filed a motion to intervene in Republic of Ecuador v. ChevronTexaco Corp. In an April 2006 ruling, that court had denied a motion by Ecuador and Petroecuador (collectively “Ecuador”) to dismiss a counterclaim by ChevronTexaco and Texaco Petroleum (collectively “ChevronTexaco”) which implicates the rights and claims of the Kichwa, Huaorani, and other affected groups.\(^6\) The counterclaim asserts that the environmental remediation claims in the Lago Agrio lawsuit are barred by releases granted to ChevronTexaco by Ecuador pursuant to the 1995 Remediation Contract (discussed above) and a subsequent agreement, the 1998 “Final Act,” which certified that Texaco Petroleum had performed its obligations under the Remediation Contract.

Although the language in both the contract and Final Act explicitly states that the release from liability applies to claims by the Ecuadorian State and national oil company — and Ecuador maintains that it did not intend or agree to extinguish any rights or claims by third parties — ChevronTexaco alleges that Ecuador (and Petroecuador) “owned all rights to environmental remediation or restoration” by ChevronTexaco in the concession area at the time the agreements were signed, and “fully released those rights in exchange for the remediation performed” under the agreement. The company further contends that Ecuador breached those agreements by “allowing the Lago Agrio lawsuit to proceed” without intervening to inform the court that it “owned and released all rights to environmental remediation and restoration” by ChevronTexaco, and by refusing to indemnify the company for its costs in that litigation. The counterclaim states that ChevronTexaco has incurred “millions of dollars in attorneys’ fees, consulting fees, and expenses . . . to date in connection with defending” the Lago Agrio lawsuit, and asks the court to award damages and declaratory and injunctive relief.\(^7\)

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7. ChevronTexaco Answer and Counterclaim, supra note 64, ¶¶ 10, 13, 64. Specifically,
Despite the fact that *Aguinda v. Texaco*, which was pending when the release was negotiated, clearly sought both damages and equitable relief for environmental remediation, \(^98\) ChevronTexaco now contends that *Aguinda* was primarily an action for damages to individuals, unlike the Lago Agrio lawsuit which seeks to vindicate public rights to remediation. \(^99\) According to the company, a statute enacted in Ecuador in 1999, the Law of Environmental Management, first granted Ecuadorian citizens the right to sue companies like ChevronTexaco for general environmental remediation, as distinguished from claims based on specific injuries to individuals. Previously, the company maintains, those claims belonged exclusively to Ecuador. \(^100\) If accepted by the court, this new legal theory — first asserted by ChevronTexaco in *Republic of Ecuador* in 2005 but evidently not reported in media accounts of the dispute — would radically limit the source and scope of affected residents’

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the Counterclaim seeks an injunction ordering Ecuador and Petroecuador to indemnify Texaco Petroleum and ChevronTexaco for all fees and expenses relating to the Lago Agrio lawsuit, and a declaration that Petroecuador is in breach of its obligation to indemnify Texaco Petroleum under the consortium’s operating agreement; that Ecuador and Petroecuador are in breach of their obligations under the releases; and that Ecuador and Petroecuador “are obliged to intervene in the Lago Agrio litigation and inform the Ecuadorian court that they owned and released all rights to environmental remediation and restoration” by Texaco Petroleum in the area, and to indemnify and hold harmless Texaco Petroleum and ChevronTexaco for all fees and expenses relating to the Lago Agrio lawsuit, “including any final judgment that may be rendered against ChevronTexaco in Ecuador.” The Counterclaim also seeks costs of the New York action, including attorneys’ fees. *Id.* pt. VI. It characterizes the Lago Agrio case as a “private-attorney-general action.” *Id.* ¶ 75.

\(^98\) *Aguinda* Complaint, *supra* note 42; Jota v. Texaco, Inc., 157 F.3d 153, 156 (2d Cir. 1998) (remanding *Aguinda* after the first dismissal); Transcript of Proceedings Before Hon. Jed S. Rakoff, *Aguinda* v. Texaco, No. 94 Civ. 9266 (S.D.N.Y. Apr. 12, 1999). In addition, the *Aguinda* attorneys and Texaco discussed payments for environmental remediation in settlement negotiations while that lawsuit was pending. The talks took place after the releases had been signed, and a written settlement proposal presented by the plaintiffs’ lawyers to Texaco in 2001 reportedly sought tens of millions of dollars for environmental remediation, significantly more that was requested to compensate plaintiffs and the class for damages. *See supra* note 70.

\(^99\) As observed by the Court in New York:

Absent this contention by Defendants, it would be extremely difficult for Defendants to establish that claims nominally brought by third parties in the Lago Agrio litigation were covered by the 1995 and 1998 agreements between Texaco and Ecuador: it is highly unlikely that a settlement entered into while *Aguinda* was pending would have neglected to mention the third-party claims being contemporaneously made in *Aguinda* if it had been intended to release those claims or to create an obligation to indemnify against them . . .


\(^100\) *See Law of Environmental Management, supra* note 72.
environmental rights and claims, and could bar them from pursuing many of the claims asserted against ChevronTexaco in the *Aguinda* and proposed intervener complaints.\textsuperscript{101} It contradicts Texaco’s assurances to the *Aguinda* court that those plaintiffs’ claims could be adequately litigated in an Ecuadorian forum and is contested by Ecuador, which maintains that Ecuadorian citizens possessed the right to sue oil companies for remediation prior to the 1999 legislation.\textsuperscript{102}

The Kichwa and Huaorani representatives sought to intervene for two purposes. The first purpose was to protect their rights, claims, and interests, and “vigorously dispute” ChevronTexaco’s allegation that they lacked the right to sue Texaco for remediation and restoration prior to enactment of the 1999 law, and “the corollary implication that absent the legislation, they would have no rights or claims for remediation or restoration against ChevronTexaco or any other oil company that damaged, destroyed, degraded, and/or contaminated their environment and natural resources.” The second purpose of intervening was to assert claims against ChevronTexaco that are not being litigated in New York or Lago Agrio.\textsuperscript{103} Their proposed complaint

\textsuperscript{101} See ChevronTexaco Answer & Counterclaim, supra note 64; Declaration of C. MacNeil Mitchell, Republic of Ecuador v. ChevronTexaco, 2006 WL 3887089 (No. 04-CV-8378), at Exhibit 5 (S.D.N.Y. Oct. 30, 2006); Reply Memorandum of Law of Proposed Intervening Plaintiffs Kemperi Baihua, et. al., in Support of the Motion of Kemperi Baihua, et. al., to Intervene as Plaintiffs Pursuant to Fed.R.Civ.P.24, at 15-16, Republic of Ecuador v. ChevronTexaco, No 04-CV-8378 (S.D.N.Y. Nov. 2, 2006) [hereinafter Reply in Support of Intervention] (arguing that newspaper articles submitted by Ecuador to oppose intervention as untimely “in no way suggest that this case is a dispute about whether affected third parties have legal rights and claims to environmental remediation and restoration” but rather portray it “as a contract dispute over the costs of environmental remediation, whether Petroecuador must share financial responsibility for the environmental disaster caused by [Chevron]Texaco, and whether Petroecuador must indemnify [Chevron]Texaco for costs and any possible judgment against it that might result from the Lago Agrio litigation”).

\textsuperscript{102} Ecuador v. ChevronTexaco, 426 F. Supp. 2d 159 (S.D.N.Y. 2006).

\textsuperscript{103} Memorandum of Law of Proposed Intervening Plaintiffs Kemperi Baihua, et al., in Support of the Motion to Intervene of Kemperi Baihua, et al., to Intervene as Plaintiffs Pursuant to Fed.R.Civ.P.24, at 6, Republic of Ecuador v. ChevronTexaco, 2006 WL 3669156 (No. 04-CV-8378) (Oct. 12, 2006) [hereinafter Memorandum in Support of Intervention]. The author was co-counsel for the proposed intervening plaintiffs (with Law Offices of Robert T. Vance, Jr.). The Kichwa proposed interveners are members of nineteen Lower Napo Kichwa communities; they sought to intervene on behalf of their families and communities. The Huaorani are from nine communities and sought to intervene on behalf of their families, communities, and the Huaorani People. Id. at Exhibit A. Many of the proposed interveners and their communities participated in the effort to sue ChevronTexaco in Tena; none were plaintiffs in the Lago Agrio case or *Aguinda*. 


included common law claims for damages and equitable relief (for remediation and restoration and for medical monitoring) and three claims based on international law, including discrimination and other human rights violations and, on behalf of the Huaorani People, a claim for ethnocide and violation of the right to culture. 104

104. Id. The complaint cites fifteen international law instruments and customary international law, among other sources of law, in support of the causes of action. The discrimination claim cites the International Convention on the Elimination of All Forms of Racial Discrimination (in effect since 1965), other international human rights instruments, and ILO Convention 169. It includes allegations related to racism against indigenous peoples in Ecuador and accuses Texaco of discriminating against the Kichwa and Huaorani in the following respects, among others: failing to respect their land and property rights in the same manner that such rights were respected for others, and engaging in conduct for the purpose and/or effect of impairing or nullifying their land and property rights; failing to indemnify them for damages or undertake adequate reparation of damages in the manner that such rights were respected for others; callously disregarding their rights, interests, health, environment and welfare, and engaging in conduct that had the purpose and/or effect of impairing or nullifying their land, environmental and human rights, cruelly disrupting their lives, cultural practices and way of life, impairing and/or endangering their means of subsistence, food security, economy, health and cultural survival, which resulted in a grossly disproportionate distribution of the costs and benefits of development and unequal protection of the law; promoting, assisting, supporting and profiting from ethnocidal policies and practices that had the purpose of altering and/or exterminating their cultures and way of life, and impairing and/or nullifying their rights; promoting, assisting, supporting, and profiting from policies and practices that had the purpose and/or effect of impairing their exercise and enjoyment of their land, cultural, and other rights on the basis of racist doctrines of Christian and white superiority and other ideas or theories of the superiority of Western culture over indigenous cultures; using the term "Auca," which is a racist and derogatory term used to refer to the Huaorani, which means "savage" and is considered deeply insulting by the Huaorani, in names that it gave to oil fields and infrastructure located in lands from which the Huaorani had been displaced; failing to implement a 1982 Environmental Policy directive in the Ecuador operations in the same manner or to the same extent that the policy (distributed by Texaco, Inc.) was implemented in operations in the United States; undertaking "remedial activities" (pursuant to the 1995 Remediation Contract) "on the cheap," with the purpose or effect of perpetuating an international double standard of environmental protection, whereby certain standards and practices that were commonly used in the United States were not applied in Ecuador, and certain standards and practices were used in Ecuador that were not generally accepted and applied in the United States, and which resulted in lower levels of environmental protection in Ecuador; collaborating with the Republic of Ecuador and missionaries from the United States to cruelly displace Huaorani from large tracts of their ancestral lands, with the purpose and effect of impairing and/or nullifying the land and cultural rights of the Huaorani, denying them the right to enjoy, develop, and transmit their own culture and exterminating their way of life, and promoting racist doctrines and ideas of the superiority of Christianity and Western civilization and culture, and aiding, supporting, and abetting those activities; and cruelly and callously facilitating the conquest and pacification of the Huaorani Nation (by Ecuador), with the purpose and/or effect of impairing or nullifying
In their submissions to the court, the proposed intervening plaintiffs argued that Ecuador could not adequately protect their interests in the litigation for three principal reasons. First, their international law claims also implicate Ecuador and Petroecuador, so Ecuador has a conflict of interest. Second, Ecuador’s legal arguments related to whether the 1995 and 1998 agreements extinguished or barred local residents’ rights appear to center on Ecuadorian law and do not take into account third party rights under international law, so intervention would allow the court to have the benefit of a more fully developed record. Third, as a practical matter, it would be a mistake to rely on Ecuador to adequately represent the interests of the interveners because Ecuador and Petroecuador have failed to protect or respect their rights throughout the history of the operations and, although they agree with Ecuador’s current position that the releases do not bar their environmental remediation claims, the government of Ecuador is “plagued by chronic instability and endemic corruption.” No elected president has completed his term of office since 1996, new elections were scheduled for 2006, and during the course of the Aguinída litigation, “successive governments repeatedly changed the position of the Republic of Ecuador in submissions to the court.”

In addition, the decision by Ecuador to withdraw an important affirmative defense days before the motion to intervene was filed raised further concerns about its willingness and capacity to adequately protect the interests of the Kichwa and Huaorani. That defense, that the 1995 and 1998 agreements are “voidable and may be rescinded” because they were “procured [by ChevronTexaco] through fraudulent inducement”—more specifically, by “a series of material misrepresentations or omissions [about the environmental status of the oil fields Texaco had been operating] that [ChevronTexaco] knew were false and misleading and would be reasonably relied on” by Ecuador and Petroecuador—was dropped in order to limit the issues to be tried. Ecuador and Petroecuador had added the additional affirmative defense by stipulation in August 2006, but then “determined that litigation regarding their free exercise and enjoyment of their ancestral lands and their right to own, develop, control, and use their communal lands, territories and resources, and with reckless disregard for their health and welfare. Id. ¶¶ 116-122.

106. Plaintiffs’ Memorandum of Law in Support of Their Motion to Amend Their Reply to Defendants’ Counterclaims in Order to Assert One Additional Affirmative Defense, at 2, 4, Republic of Ecuador v. ChevronTexaco, No. 04-CV-8378 (S.D.N.Y. June 20, 2006).
the scope and cause of environmental harm in the concession area simply required too great an expenditure of resources with too little time prior to trial to complete," and decided to "husband their resources." 108

ChevronTexaco and Ecuador both opposed the motion to intervene, essentially arguing that it was untimely; that intervention would prejudice the parties and significantly expand and delay the proceeding; that the Kichwa and Huaorani do not have a legal interest that may be impaired in the litigation because it is a contractual dispute, and they are strangers to the contracts and agreements between the parties; and that any interest they may have could be adequately protected by Ecuador. 109 In November 2006, the court denied the motion, ruling that there is "a strong need for the case to proceed as expeditiously as possible." 110 Although discovery was still underway, Judge Leonard Sand noted that the trial date of March 1, 2007, had been set "for some time" and the parties had "incurred considerable expense" in "reliance on that trial date." Intervention would delay the case and "significantly alter the nature of the proceeding," converting it into "a toxic tort case of the sort which the Second Circuit has already opined in a related case [Aguinda]..."


109. The parties also argued that the interveners should have known about their alleged interest when ChevronTexaco filed its Answer to the Amended Complaint and Counterclaim in January 2005. Memorandum of Defendants/Counterclaim Plaintiffs ChevronTexaco and Texaco Petroleum Company in Opposition to Motion of Kemperi Baihua et al. to Intervene as Plaintiffs Pursuant to Fed.R.Civ.P.24, Republic of Ecuador v. ChevronTexaco, No. 04-CV-8378 (S.D.N.Y. Oct. 30, 2006) [hereinafter ChevronTexaco Opposition to Intervention]. Ecuador further contended that: ChevronTexaco's legal maneuvering had been widely publicized and is known in Ecuador; substantially identical issues are being litigated in Lago Agrio; Ecuador had lost its right to assert the now-withdrawn defense of fraud in the inducement, so the movants should not be allowed to pursue those and similar fact-intensive issues; the movants would not be impaired by an adverse judgment because there is no pending federal court action, and Ecuador's courts do not apply the doctrine of stare decisis; the movants could bring another, separate action; and Ecuador would not agree to waive sovereign immunity to any third party claims. Ecuador Opposition to Intervention, supra note 108. ChevronTexaco further contended that the interveners were trying to split their claims, forum shop, and circumvent prior judgments, and that they have an action pending against ChevronTexaco in Tena; that the case in New York would not limit or determine the scope of any further environmental remediation but only decide who would bear the cost, if any; and that the movants share Ecuador's interest in making ChevronTexaco pay. ChevronTexaco Opposition to Intervention, supra note 109.

is inappropriate for resolution in the United States.” The court stressed that the underlying dispute in the litigation is whether ChevronTexaco and Ecuador’s dispute can be the subject of arbitration in the United States, and that the parties “have a great deal at stake with respect to the timing” of the litigation — “[a]rbitration being a form of dispute resolution that people invoke in their agreements . . . [with] the expectation that it is a relatively speedy and efficient procedure to resolve disputes.”

The court’s reliance on the need for a speedy resolution of the underlying arbitration dispute is ironic in view of the fact that ChevronTexaco did not initiate arbitration proceedings until more than ten years after it was first sued by the Aguinda plaintiffs, and its representations to the Aguinda court that it would implead Petroecuador in lawsuits by those plaintiffs in Ecuador. In addition, although Judge Sand noted that “it is distressing to read [in the submissions] the belief I’m sure is held that the would-be interveners are being deprived of a fair and effective judicial system in their home country,” he did not address their argument that any prejudice caused to

111. Id. at 11-12. The court also noted that the parties “have agreed to forego certain positions which would have precluded the trial from going forward effectively” on the scheduled date. Id. at 12.

112. Id. at 11; see Memorandum in Support of Intervention, supra note 103, at 14-15; Reply in Support of Intervention, supra note 101, at 3-13 (discussing the Lago Agrio and Tena litigation). Interestingly, ChevronTexaco did not dispute the Proposed Interveners’ assertion that the refusal by the Tena court to open their case was “an act of corruption.” The company incorrectly implied, however, that the Proposed Interveners were being duplicitous by allegedly attempting to pursue two actions at the same time. In a disquieting disclosure, ChevronTexaco stated that its counsel had been “advised informally that service of process is imminent” in the Tena case. ChevronTexaco Opposition to Intervention, supra note 109, at 1; see also Reply in Support of Intervention, supra note 101, at 9-13. As discussed supra, service of process is an action that Ecuadorian legal procedures place in the hands of the judge who will decide a lawsuit (in the first instance), rather than the plaintiffs. ChevronTexaco did not explain how it was “advised informally” about an action that would be undertaken by the Tena court before it had occurred, or disclose its source; the Tena plaintiffs and their counsel had no such knowledge. The suggestion that the case could somehow proceed without the plaintiffs’ knowledge or participation is troubling. In addition, the timing of the “informal” disclosure suggested foul play and corroborated the Proposed Interveners’ misgivings about Ecuador’s judicial system: after more than three years of delay caused by the Tena court’s unlawful refusal to open their case, and nine months after the complaint had been returned by the Supreme Court to the Tena court, ChevronTexaco asserted that the case would be revived and opened. That revelation was made just as some of the Tena plaintiffs were seeking to intervene in the litigation in New York (where courts do not permit “informal” ex parte communications) and despite the fact that the Tena plaintiffs had not taken any action to attempt to reinitiate that case. Id.
ChevronTexaco by allowing intervention would be “a self-inflicted wound” caused by the company’s injection of the Huaorani and Kichwa communities’ legal interests into the case. By seeking a judicial determination that Ecuador and Petroecuador owned and released all rights to environmental remediation and restoration by the company, and that the proposed interveners and their communities have no such rights or claims, ChevronTexaco had itself transformed the case from a simple breach of contract dispute — about whether arbitration is appropriate and about how to allocate the costs of the liabilities of Texaco’s operations — into a case that could have far-reaching implications for all of the inhabitants of the affected region. Had the company limited the issues in the litigation to purely contractual ones, the proposed interveners argued, and not sought a ruling that would severely limit the scope and sources of their rights and claims, they would not have been compelled to seek intervention to protect and vindicate their rights.113

In June 2007, as this article was going to print, Judge Sand ruled that Ecuador and Petroecuador had not agreed to arbitrate disputes with Texaco, and granted their request (in a motion for summary judgment) for a permanent injunction staying Chevron from continuing the arbitration in New York. The portion of the summary judgment determination relating to claims based on the 1995 Remediation Contract was set aside for the parties to reevaluate their posture; Judge Sand noted that the plaintiffs had stated that they would withdraw their claims if they were victorious on the arbitrability issue, and granted the parties sixty days to confer and advise the court “what further proceedings, if any, they intend to pursue before this Court.”114

Outside court, in another recent development, the Kichwa and Huaorani alliance resolved to also become more proactive, by beginning to develop and implement remedial projects themselves, rather than simply denouncing, exhorting, petitioning — and waiting for others to act. The Kichwa want to begin an environmental remediation by cleaning up an abandoned waste pit and reclaiming the site for sustainable community development; a longer term goal is to provide every family in the community with access to safe drinking water.

The Huaorani decided to prioritize cultural damages, and to begin by supporting a grassroots initiative to protect a 758,051-hectare115 area of

115. One hectare is 100 meters x 100 meters; 758,051 hectares is 7,581 square kilometers, or 2,927 square miles, roughly the size of Delaware and Rhode Island combined.
rainforest known as the "Intangible Zone." The Intangible Zone was designated as a conservation area — off-limits to oil development, mining, and logging — in 1999, and includes the territory of the last (known) group of uncontacted Huaorani, the Taromenane-Tagaeri, as well as lands that are used and occupied by three communities of contacted Huaorani. The

116. Constitutional President of the Republic, Decreto Ejecutivo No. 552 [Executive Decree No. 552], R.O. No. 121 (Feb. 2, 1999) (Ecuador) (declaring an "intangible zone" of approximately 700,000 hectares in Huaorani titled lands and Yasuni National Park, to be delimited within 120 days); Constitutional President of the Republic, Decreto Ejecutivo No. 2187 [Executive Decree No. 2187] (Jan. 3, 2007) (Ecuador) (defining boundaries, spanning 758,051 hectares, of the intangible zone decreed in 1999 to protect the rights of the Tagaeri, Taromenane, and other uncontacted groups of Huaorani). The 2007 decree also designates a buffer zone, which includes lands that are used and occupied by a fourth community of contacted Huaorani. Reportedly, a commitment by the European Community to provide economic aid for conservation was an important factor in the initial decision (by then-President Mahuad) to protect the Intangible Zone from oil development and other extractive industries. In addition, a history of violent encounters with the Tagaeri (which continued even after they were driven from their homelands by Texaco's operations), lobbying by the Catholic Church in Ecuador, and growing international pressure to respect the right of the Tagaeri to resist contact with "Western" society and to protect them from extinction by protecting the lands they inhabit, likely played a role.

The decrees are significant because Ecuador permits oil development in other protected areas, including national parks, and in lands that are titled to the Huaorani (and other indigenous groups) without obtaining their consent. According to ONHAE, 80% of Huaorani Territory has been included in areas licensed to oil companies by the state. In a message to "the peoples who live where the oil companies come from," Kemperi Baihua, a Huaorani shaman and leader who lives in the Intangible Zone, explained why his community, Bameno, opposes further expansion of the oil frontier:

My message is that we are living here. We are living bien (in a good way). No more [oil] companies should come, because already there are enough. They need to know that we have problems; I want them to comprehend what we are living. Many companies want to enter, everywhere. But they do not help; they have come to damage the forest. Instead of going hunting, they cut down trees to make paths. Instead of caring for [the forest], they destroy. Where the company lives, it smells nasty; the animals hide; and when the river rises the manioc and plantain in the low areas have problems. We respect the environment where we live. We like the tourists because they come, and go away. When the company comes, it does not want to leave. Now [the company] is in the habit of offering many things; it says that it comes to do business, but then it makes itself into the owner. Where the company has left its environment, we cannot return. It stays bad. Something must remain for us. Without territory, we cannot live. If they destroy everything, where will we live? We do not want more companies to enter, or more roads. We want to live like Huaorani, we want others to respect our culture.

Message from Kemperi Baihua, Huaorani Community of Bameno, Cononaco River (2005) (translated from Huaorani to Spanish by Penti Baihua) (related to the author on August 8, 2005
Taromenane-Tagaeri are the only known group of people still living in voluntary isolation in the Amazon Rainforest in Ecuador, but are threatened with extinction by encroaching oil development and violent encounters with illegal loggers. The remedial project is led by contacted Huaorani in the area who are working to defend their culture and rainforest environment (which go hand-in-hand) by organizing to stop logging in the Intangible Zone and to support community-based alternatives to logging and oil extraction that “do not damage the environment or bother the Taromenane, Tagaeri, or other Huaorani who want to live in isolation in the forest.” These remedial initiatives represent small steps forward in what is expected to be a long and challenging process, and they will require considerable external support to succeed. However, they also represent a major new approach to the need to remedy problems that began with Texaco’s arrival, and continue to this day.

VII. Conclusion and Recommendations

ChevronTexaco’s discovery of commercially valuable oil in the Amazon Rainforest in Ecuador was heralded as the salvation of Ecuador’s economy, the product that would pull the nation out of poverty and “underdevelopment” at last. The discovery ignited an oil rush that made the conquest of Amazonia a national imperative, and petroleum quickly came to dominate Ecuador’s economy and quest for progress.

But the reality of oil exploration and production turned out to be far more complex that its triumphalist launch. For indigenous Amazonian peoples, including the Huaorani and Lower Napo Kichwa, the arrival of ChevronTexaco meant destruction rather than development. Their homelands were invaded and degraded by outsiders who, over time, dramatically transformed natural and social environments. Their worlds changed forever,

in Bameno and first published in KIMERLING, MODEL OR MYTH?, supra note 30, at 7-8).

117. Logging is a growing problem in Huaorani Territory and Yasuni National Park. It began in the vicinity of the road that Texaco built into traditional Huaorani territory but has steadily expanded deeper into the forest. Until recently, it was limited to one type of tree, cedro. The wood trade is reportedly controlled by Colombians based in Francisco de Orellana (Coca), who hire Afro-Ecuadorians and Kichwa from other areas to go into the forest to extract wood. It is transported by canoe to the Texaco road; from there it travels by truck to Coca, and then reportedly to Colombia. Before reaching Coca, the Texaco road passes by a military base, located across the Napo River from Coca; however, the control at the entrance to the bridge that crosses the river is no longer manned. Many people privately attribute the failure of Ecuadorian authorities to control the wood trade at that location to a lack of political will and corruption.

118. The alternatives include locally-controlled tourism and sales of sustainable products.
Amazonian peoples have borne the costs of oil development without sharing in its benefits and without participating in decisionmaking that affects them.

The Aguinda v. Texaco lawsuit created an unprecedented opportunity for corporate accountability and environmental justice. The allegations in the complaint echoed longstanding grievances in the oil patch. The idea of equality before the law and the international spotlight held by the litigation emboldened affected populations and catalyzed many people to action. However, many factors have made it difficult for local communities to participate in the litigation or have a voice in its conduct.

Class action lawsuits can be a powerful vehicle to influence corporate behavior and obtain remedies for large numbers of people, but in cases like Aguinda, it can be difficult to identify an appropriate class and provide class members with meaningful information and input into the conduct of the case. The failure of the Aguinda plaintiffs’ lawyers and their NGO supporters to foster transparent, participatory, and accountable processes for decision-making by the claimants — and their apparent determination to, in the words of local critics, “speak for all but work only with a few” — has threatened the case’s potential to sow the seeds of a veritable environmental justice and human rights legacy in Ecuador’s oil frontier.119

For lawyers, activists, academics, and oil companies, legal precedents that penalize multinational corporations and build instruments for international environmental accountability under the current free trade regime are clearly significant. Yet to the Aguinda plaintiffs and class, that is an abstract concept; they have concrete needs. When it comes to remedies, cases like Aguinda pose special, but not necessarily insurmountable, challenges. It remains to be seen whether a victory in court, or a settlement through plaintiffs’ counsel, will obtain meaningful remedies for affected populations and the environment, or simply empower and enrich a new layer of elites, and set back grassroots struggles for corporate accountability and environmental justice by promoting conflict, corruption, and cynicism. Those who have suffered most from ChevronTexaco’s operations risk becoming symbols of justice without getting justice or adequate remedies.

The emergence of an unprecedented community-based alliance (Makarik Nihua) among Huaorani and Napo Kichwa members of the class, in the wake of Aguinda, to work together to protect and vindicate their rights, has

119. At the same time, the need by the plaintiffs’ lawyers and NGOs to legitimize their activities and develop mechanisms to deal, in their way, with a large and diverse group of claimants, has led them to try to impose (and/or support) a spurious political process, the “Assembly of Delegates of the People Affected by Texaco’s Operations.”
revitalized local struggles for environmental protection and respect for the rights of indigenous peoples. However, the response of external legal and political institutions and actors, including private NGOs that claim to support the affected communities, has been disappointing, and it remains to be seen whether the Huaorani and Kichwa — and Aguinda plaintiffs and other members of the putative class — will get an impartial adjudication of their claims.

The decision to dismiss *Aguinda v. Texaco* was colored by a series of detailed but questionable factual assumptions, including erroneous and unsupported findings about the litigation record in Ecuador’s courts, and rulings on disputed material facts related to decision-making and control of the operations that gave rise to the plaintiffs’ claims. The portrait of Texaco’s role in the operations in the decision to dismiss is incongruous with the reality of oil development in Ecuador, including the environmental law vacuum and culture of impunity in the oil frontier, the experience of Amazonian peoples and other Ecuadorians with the company, and the image cultivated by Texaco before it was sued. The application of the *forum non conveniens* doctrine to dismiss the case represents an abdication of responsibility by the federal judiciary and sends a troubling message: that U.S. laws and institutions create and protect multinational corporations, but generally do not regulate their operations and decline to act when they harm people and the environment abroad.

Although the decision by the Northern District of California to allow *Doe v. Texaco* to go to trial suggests that some judges are open to claims by discrete and clearly defined groups of foreign plaintiffs who have real grievances against U.S. corporations, the refusal by Judge Sand to allow the Huaorani and Kichwa representatives to intervene in *Republic of Ecuador v. ChevronTexaco* indicates that access to the administration of justice in U.S. courts, and protection under the law, is unequal. At the same time, the effort by both Ecuador and ChevronTexaco, in response to the motion to intervene, to limit the issues and law in that dispute to contractual intent (based on secret negotiations, without participation by affected groups or other democratic safeguards) and treat the Kichwa and Huaorani who are injured by their agreements as “strangers” to those accords, with no legally cognizable interests, continues the historic trend of excluding indigenous Amazonian peoples from decision-making processes, and disregarding their rights. That
dynamic persists to this day\(^{120}\) and is reflected and reinforced by Judge Sand's decision to deny the motion to intervene.

In reflecting on the role of international law, there are many international norms that support the claims of the Huaorani and Kichwa, and other affected groups. However, those norms primarily, but not exclusively, oblige state actors. Most importantly, they rely on those same state actors to apply and enforce them. In this case, the harmful operations were transnational in nature, and two national legal systems have had jurisdiction over myriad claims. One state, Ecuador, embraces the discourse of international law and has even written much of it into the highest law of the land, the constitution, but its political institutions, including the courts, are so notoriously corrupt and dysfunctional that there is a staggering gap between those legal ideals and social and political realities. The other state, the United States, has a rich but uneven judicial history of applying international law and adjudicating international disputes, and appears to be more open to adjudicating commercial litigation and to protecting the legal rights and interests of U.S. corporations than to hearing tort litigation by foreign residents who need remedies for injuries that those companies cause.\(^{121}\)

Although litigation by foreign plaintiffs in U.S. courts based on development activities that are carried out in a foreign country, in partnership with the government of that county, raises difficult legal, political, and practical issues, there is a significant public interest and moral obligation in the United States to remedy injuries in other countries that result from the activities of U.S. corporations. U.S. courts have experience with complex civil litigation and remedies and are held in high regard by many people. In the oil fields of Amazonia and many other locations, the lack of meaningful environmental regulation and impartial fora to administer justice are serious problems. The *Aguinda* case and its progeny show that even with sixteen years in the spotlight and considerable legal and political activity, people's rights are still being violated and no one is accepting responsibility. Until governments develop effective regulation of transnational corporations and credible, effective fora to adjudicate grievances and remedy the injuries they

\(^{120}\) For a study of more recent developments in environmental law and efforts to limit environmental standards to norms in negotiated agreements that exclude indigenous peoples and disregard their rights, see Kimerling, *Rio + 10, supra* note 12.

\(^{121}\) For a fuller discussion of transnational litigation in U.S. federal courts and the rich judicial history of applying international law, see Harold Hongju Koh, *Transnational Public Law Litigation*, 100 *YALE L.J.* 2347 (1991). Koh challenges the "recent status quo" of judicial restraint in applying international law in noncommercial (tort) litigation.
cause, U.S. courts should not use the forum non conveniens doctrine to deny foreign plaintiffs who have real grievances against U.S.-based corporations a day in court. Similarly, U.S. courts should not shy away from applying international law, and corporations should not be allowed to use arbitration agreements to bypass the courts and shut out plaintiffs who need to be heard. Finally, indigenous peoples are not strangers, without interests, to operations — and consequences — of U.S.-based corporations in their territories, and should not be treated as such by U.S. courts or the law.

For both indigenous peoples and campesinos in the Amazon who have been injured by ChevronTexaco and Petroecuador, environmental and social remedies are urgently needed. The Ecuadorian government should establish a blue ribbon commission to assess current environmental and public health conditions in the affected areas, and develop and oversee the implementation of a comprehensive remediation plan. The commission should include independent experts with experience in environmental remediation and health care, as well as representatives of affected indigenous peoples, colonists, Petroecuador, and Chevron. The selection of commissioners to represent the affected people(s) should be made by the affected communities, and the number of representatives should be sufficient so that diverse groups who seek to participate in the process can feel truly represented. The work by the commission should be clear and transparent, and include mechanisms to inform, consult, and gain the confidence and approval of affected communities. The commission should also develop and monitor the implementation of a credible mechanism to indemnify affected residents and support community-centered sustainable development initiatives. Chevron should assume primary responsibility for the costs of those activities, but Ecuador, Petroecuador, and the United States government should also accept responsibility for their complicity in the tragedy and contribute. In addition, Petroecuador and Ecuador need to get serious about environmental protection in the oil patch — and respect for the rights of local populations — to prevent the re-contamination of areas that are remedied.

To prevent further injuries to Amazonian indigenous peoples and protect their rights in the development process, the principle of free, prior, and informed consent needs to be applied in the oil fields. As a general matter, the imposition of alien models of development on indigenous peoples against their wishes is unconscionable. In Ecuador, the experience of indigenous peoples with Texaco, Petroecuador, and Aguinda v. Texaco and its progeny clearly shows that national and international political and legal systems cannot, or will not, prevent and remedy violations of the rights of indigenous peoples.
For the rule of law to serve as an instrument of justice, the rules must be fair. When rules are inequitable, the rule of law can be an instrument of aggression and destruction, rather than democracy and development. The use of the rule of law to promote and impose oil development but not to control or remedy the injuries it causes is fundamentally unfair and reflects and reinforces gross inequities in law and governance. To continue to ensnare indigenous peoples in economic globalization and subject them to the reach and logic of global markets without equal rights and protection of the law is unjust. In effect, corporations and governments already exercise the right of free, prior, and informed consent when they negotiate contracts for development. Until indigenous peoples also exercise that right — without coercion, manipulation, or the threat of losing their lands if they say "no" to development projects — the kinds of abuses that began with ChevronTexaco, and are still going on today, can be expected to continue. Similarly, until indigenous peoples enjoy equal access to the administration of justice, their rights will continue to be violated by state parties and corporations with impunity.

Throughout Amazonia, the environmental, social, and cultural costs of the continued expansion of the oil frontier are still high. At best, the jury is still out on whether companies can extract oil and gas from a rainforest environment without serious injury. The track record of the industry to date strongly suggests that they cannot. Moreover, the cumulative impact of expanding oil, gas, and international pipeline projects has not been adequately assessed. No new hydrocarbon activity should go forward in Amazonia until major problems that already exist have been corrected, and governments and industry have demonstrated — by action at existing facilities rather than plans for future ones — that they can honor promises to protect the environment and respect the rights of local populations. At least some areas should be off-limits to oil and other industrial development, including the territory of the Taromenane-Tagaeri band of Huaorani and other voluntarily isolated indigenous peoples, and contacted communities who want a different model of development should have the right to make that choice. Modern oil and gas development that is compatible with sustainable development and the well-being of Amazonian peoples, if it is attainable, must be based on free, prior, and informed consent; comprehensive environmental planning that fully considers the cumulative impact of incremental hydrocarbon and infrastructure development throughout the region; strict controls; equal access to redress and remedies; and careful long-term monitoring, anchored in the rule of law and broad public participation, in the light of the day.